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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No.

POTOMAC ELECTRIC POWER COMPANY, *Petitioner,*

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

AND

TERRY M. CROSS, JR., *Respondents.*

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioner, POTOMAC ELECTRIC POWER COMPANY, prays that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the District of Columbia Circuit, entered in the above-entitled case on August 24, 1979 (Appendix A).

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Appendix A) has not yet been reported. The decision of the Benefits Review Board of the Department of Labor (Appendix B) is reported at 7 BRBS 10. The opinion and Order of the Administrative Law Judge of the Office of Workers' Compensation (Appendix C) is not yet reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 24, 1979. No petition for re-hearing was filed in that Court. Jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether the divided opinion below was correct in requiring an employer subject to the Longshoremen's and Harbor Workers' Act, which had paid all compensation due to an injured employee for permanent partial disability during the period specified for a loss scheduled under Section 8(c)(2), (19), to pay additional compensation beyond such specified period by reason of Section 8(c)(21), which by its terms is confined to "other cases" in such class of permanent partial disability, particularly in the circumstances where (a) no other federal court had reached such a conclusion as to the 52-year old Act's statutory presumptions on the period of disability for such specified losses, and (b) the Congress failed to adopt a proposed amendment to such Section allowing such

additional compensation in the 1972 Amendments to the Act.

STATUTE INVOLVED

The Federal Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §901, *et seq.* is made applicable to the District of Columbia pursuant to the provisions of the District of Columbia Code § 36-501, *et seq.* The statutory provisions involved in this case are fully set forth in the Statutory Appendix, pages 1a-4a.

STATEMENT OF THE CASE

Terry M. Cross, a Class-A cable splicer for the Potomac Electric Power Company (a self-insured employer subject to the Federal Longshoremen's and Harbor Workers' Act), sustained an on-the-job injury to his knee which required surgery for the removal of the medial meniscus (one of the cartilages of the knee joint). Upon his return to work he said he was able to carry out some, but not all, of the duties of his job, and therefore was continued as a Class-A cable splicer at the straight hourly rate for that classification, doing lighter work which did not involve climbing. He was later denied in-grade raises and was not allowed to work overtime because of his inability to perform all job requirements.

Medical testimony from two (2) doctors revealed that Mr. Cross sustained a permanent partial disability of the leg rated between 5 and 20%. There was no evidence of any effect on any other part of the body.

The employer did not dispute compensability but contended that any Award should be made on the

basis of the irrebuttable presumptions limited to the periods specified in the schedule applicable to such injury under the Act, Section 8(c)(2), (19). The case was tried before an Administrative Law Judge who found as a fact that because of the loss of wage raises given to others in the same classification and the loss of overtime work, Mr. Cross had sustained a loss of earning capacity beyond that specified in the schedule and so awarded compensation under Section 8(c)(21), notwithstanding such sanction is limited by its terms to "other", i.e. non-scheduled, cases in this class of permanent partial disability.

The decision of the Administrative Law Judge was affirmed by the Benefits Review Board. On petition for review pursuant to 33 U.S.C. §921(c), the United States Court of Appeals for the District of Columbia Circuit, the Board's decision was affirmed by a divided panel of the Court.

REASONS FOR GRANTING THE WRIT

1. The Decision Of The District Of Columbia Circuit Below Is In Direct Conflict With The Rule Of Law Followed In The Fifth And Second Circuits.

The decision below, in allowing compensation for a permanent partial disability beyond that period specified in the statute for an enumerated scheduled loss is in direct conflict with the only other federal decision directly in point, which held that compensation under a scheduled loss is exclusive, and that the reference to "other cases" in Section 8(c)(21) relates to injuries to other parts of the body (such as the back, neck, etc.) and not to parts of the body covered by the specific losses scheduled in Sections 8(c)(1) through (19). See

Williams v. *Donovan,* 234 F.Supp. 135 (E.D. La., 1964) (Appendix D, pages 53a-61a) affirmed *per curiam* 367 F.2d 825 (5th Cir., 1966), (Appendix E, pages 63a-64a) Cert. denied 386 U.S. 977 (1967).

The decision below also conflicts with the rationale of *Flamm* v. *Hughes,* 329 F.2d 378 (2nd Cir., 1964) (Appendix F, pages 65a-69a) finding lack of a substantial federal question because of the great latitude enjoyed by Congress in its statutory scheme for compensation, and also finding that it was not irrational for Congress to provide for compensation limited to a prescribed number of weeks for enumerated disabilities, and yet provide for compensation for an indefinite period for all other injuries.

The decision below recognized the conflict with *Williams* v. *Donovan,* both in the majority (Appendix A, page 14a) and dissenting opinions (Appendix A, page 30a). The majority opinion did not refer to *Flamm* v. *Hughes,* although the dissent did (Appendix A, page 32a).[1]

2. The District Of Columbia Circuit Has Decided An Important Federal Question Which Has Not Been, But Should Be, Settled By This Court.

Clearly, this case is of importance to the Administration of the many thousands of claims under the Federal Longshoremen's and Harbor Workers' Act, which has national application to all maritime employees

[1] The desirability of uniform interpretation is enhanced by the considerations involved under the Longshoremen's Act, "• • • An Act designed to provide equal justice to every longshoreman similarly situated". *Jackson* v. *Lykes Bros. Steamship Co.,* 386 U.S. 731, 735 (1967).

(other than masters and owners of vessels) as well as to all non-governmental employees in the District of Columbia (See D.C. Code § 36-501, *et seq.*). If allowed to stand, the District of Columbia Circuit Court's opinion will undoubtedly burden the administrative bodies and the Courts with much additional litigation over the extent of compensation above and beyond that specified by the Congress for the 19 specific categories of scheduled losses involving permanent partial disability [4] and will serve to defeat one of the prime purposes of the Act, which is ". . . to provide [employees] a practical and expeditious remedy for their industrial accidents and to place on District of Columbia employers a limited and determinate liability". *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 476 (1947).

The important federal question raised should be resolved by this Court.

3. The District Of Columbia Circuit Opinion Effectively Revises A Federal Statute In A Manner Which Congress Has Specifically Rejected.

The decision below is erroneous and the conflicting decision in *Williams* v. *Donovan, supra,* correct, inasmuch as the majority below, while ". . . mindful that no Court has license to rewrite this or any other Act of Congress", circumvented not only the Act's dichotomy

[4] The majority decision below would appear to extend to every permanent partial disability enumerated in the schedule. Because "disability" is defined in Section 2(10) of the Act as ". . . incapacity to earn the wages which the employee was receiving at the time of injury in the same or any other employment . . ." each of the injuries listed under the scheduled losses presumes a loss of earning capacity. Therefore, because of the permanent nature of the disability, it must, by definition, continue beyond the number of weeks specified in the schedule.

between the enumerated parts of the body scheduled in Section 8(c)(1) through (19) and the Section 8(c)(21) reference to "other cases" but also ignored the significance of Congress' express declination to amend the Act. The Congress was well aware of the problem of a permanent partial disability lasting beyond the number of weeks specified in the schedule. In this regard, it is important to note that not only did Congress amend a counterpart compensation statute (the Federal Employees Compensation Act, 5 U.S.C. § 8101, *et seq.*) so as to provide for cases parallel to that of Mr. Cross,[5] but it also specifically rejected in the 1972 Amendments to the Longshoremen's Act, a proposed amendment to Section 8, which would have provided the additional benefits which the District of Columbia Circuit opinion provided to Mr. Cross.[6]

[5] The New York Workers Compensation Law, upon which the federal Longshoremen's Act was predicated, had a parallel "other cases" provision which had been construed so as to preclude compensation beyond the periods specified in the schedules. *Sokolowski* v. *Bank of America*, 261 N.Y. 57, 184 N.E. 492 (1933). As in the case of the Federal Employees Compensation Act, New York enacted an amendment to its Act (Art. 2, § 15) so as to provide for compensation in addition to the schedule in certain cases. See New York Law, 1970, c.286, effective July 1, 1970.

[6] Section 7 of the House and Senate Bills (S. 2318 and HR 12006, 92nd Congress, 2nd Session), which was not reported out of Committee with the 1972 Amendments to the Act (See House Report [Education and Labor Committee] No. 92-1441 [to accompany H.R. 12006], September 25, 1972, 92nd Congress, 2nd Session), would have amended Section 8(c) of the Act as follows:

> "(23) With respect to any period after payments under paragraph (c)(1) through (c)(20) have terminated, compensation shall be paid as provided in subsections (a) and (b) of this section if the disability is total, or, if the disability is partial, 66⅔ per centum of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or other employment."

CONCLUSION

For the foregoing reasons, this Petition For A Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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STATUTORY APPENDIX

Longshoremen's and Harbor Workers' Act.
33 U.S.C. 901

D.C. Code 36-501. *et seq.*

STATUTORY APPENDIX

33 U.S.C. § 908

§ 908 Compensation for disability

Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) Temporary total disability: In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

(1) Arm lost, three hundred and twelve weeks' compensation.

(2) Leg lost, two hundred and eighty-eight weeks' compensation.

(3) Hand lost, two hundred and forty-four weeks' compensation.

(4) Foot lost, two hundred and five weeks' compensation.

(5) Eye lost, one hundred and sixty weeks' compensation.

(6) Thumb lost, seventy-five weeks' compensation.

(7) First finger lost, forty-six weeks' compensation.

(8) Great toe lost, thirty-eight weeks' compensation.

(9) Second finger lost, thirty weeks' compensation.

(10) Third finger lost, twenty-five weeks' compensation.

(11) Toe other than great toe lost, sixteen weeks' compensation.

(12) Fourth finger lost, fifteen weeks' compensation.

(13) Loss of hearing: Compensation for loss of hearing of one ear, fifty-two weeks. Compensation for loss of hearing of both ears, two hundred weeks.

(14) Phalanges: Compensation for loss of more than one phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.

(15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but, if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot.

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye.

(17) Two or more digits: Compensation for loss of two or more digits, or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot.

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

(20) Disfigurement: Proper and equitable compensation not to exceed $3,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

(21) Other cases: *In all other cases* in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest. [emphasis supplied]

D.C. Code § 36-501

§ 36-501. Longshoremen's and Harbor Workers' Compensation Act made applicable to the District of Columbia.

The provisions of chapter 18 of title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the

District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person. (May 17, 1928, 45 Stat. 600, ch. 612, § 1.)

APPENDIX A

Opinion Below of the United States Court of Appeals for the District of Columbia Circuit

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1073

POTOMAC ELECTRIC POWER COMANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND TERRY M. CROSS, RESPONDENTS

Petition for Review of an Order of the Benefits Review Board of the United States Department of Labor

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Argued March 22, 1979

Decided August 24, 1979

Judgment entered this date

Richard W. Turner, with whom *Nicholas D. Ward* was on the brief, for petitioner.

William F. Krebs, with whom *Leslie Scherr* was on the brief, for respondent Terry M. Cross.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Mark C. Walters, Attorney, Department of Labor, for respondent Department of Labor. *Cornelius S. Donoghue, Jr.*, Attorney, Department of Labor, entered an appearance for respondent Department of Labor.

Before WRIGHT, *Chief Judge*, and SWYGERT * and MACKINNON, *Circuit Judges*.

Opinion for the court filed by *Chief Judge* WRIGHT.

Dissenting opinion filed by *Circuit Judge* MACKINNON.

WRIGHT, *Chief Judge*: On December 7, 1974 Terry M. Cross, Jr., a Class A cable splicer with the Potomac Electric Power Company (PEPCO), injured his left knee while on the job. The injury was sufficiently serious to require corrective surgery to remove the medial meniscus —fibrocartilage of the knee joint—from that knee. Because a Class A cable splicer performs many strenuous chores—including climbing ladders and scaffolding, crawling in and out of manholes, and lifting heavy equipment —the residual pain, discomfort, and unsteadiness experienced by Cross upon his return to work prevented him from discharging the duties of that position. PEPCO nonetheless continued to list Cross on the roster of Class A cable splicers and to pay him at the straight hourly rate for that classification. Cross found this arrangement unsatisfactory, however, because PEPCO refused to accord him the routine raises granted to others in his work classification and to allow him any of the overtime work that he had become accustomed to receiving over the years.

In February 1976 Cross filed a claim for compensation under the Longshoremen's and Harbor Workers' Compensation Act.[1] Because he and PEPCO could not agree on a method for computing compensation, the matter proceeded to a formal hearing before an Administrative Law Judge (ALJ). After receiving medical testimony that characterized Cross's injury as a five to 20 percent disability of the leg, the ALJ concluded that "Claimant has become permanently partially disabled because of the accident [and] can no longer perform the rigorous work of a Cable Spicer A * * *."[2] Noting that Cross lost overtime work and pay raises due to the injury, the ALJ awarded him compensation under Section 8(c)(21) of the Act.[3] The award, as specified by that section, was based on the difference between Cross's pre-jury weekly wages and his post-injury wage-earning capacity.[4]

PEPCO appealed the ALJ's decision to the Department of Labor's Benefits Review Board and urged there that Sections 8(c)(1)-(20) of the Act,[5] providing scheduled

* Of the Seventh Circuit, sitting by designation pursuant to 28 U.S.C. 291(a) (1976).

[1] 33 U.S.C. § 901 *et seq.* (1976). The Longshoremen's and Harbor Workers' Compensation Act is made applicable to the District of Columbia by 36 D.C. Code § 501 (1973).

[2] Joint Appendix (JA) 5-6.

[3] 33 U.S.C. § 908(c)(21).

[4] The ALJ concluded that Cross's lost earning capacity owing to the injury equaled $130.13 per week. This figure was arrived at by determining the amount of the base pay increases that Cross was denied after the injury and the amount of overtime pay lost due to the injury. The latter amount was based on the ratio of overtime to base earnings for 1972, 1973, and 1974. JA 3-4. Under 33 U.S.C. § 908(c)(21) Cross was entitled to weekly compensation of 66 2/3% of his lost earnings, which totaled $86.76 per week. The statute's compensatory scheme is described in text at notes 13-18 *infra*.

[5] 33 U.S.C. §§ 908(c)(1)-(20). PEPCO specifically urged that compensation be based on 33 U.S.C. § 908(c)(2), which provides compensation for permanent partial disability based on lost use of a leg, and on 33 U.S.C. § 908(c)(19), which

allowances for specified injuries, ought to have been used as the basis for awarding compensation rather than Section 8(c)(21). The Board held, however, that the scheduled benefits contained in Sections 8(c)(1)-(20) are not exclusive remedies and that, if a claimant can prove a loss in wage-earning capacity greater than that provided for in the schedule, he may pursue a claim under Section 8(c)(21).[6] Because the ALJ had found that Cross had sustained a loss in earning capacity greater than the compensation provided by the schedule, the Board affirmed the initial decision.[7] PEPCO, contending that the Board's analysis was premised on a faulty reading of the Act, petitions this court to set aside the Board's decision.[8]

This court must determine whether the decision of the Benefits Review Board to affirm the judgment of the ALJ is consistent with applicable law.[9] Under the Act the Board was bound to regard the ALJ's findings of fact as conclusive if supported by substantial evidence in the record considered as a whole.[10] The Board decided that the ALJ's findings were so supported,[11] and we see no reason to disagree. Nor does PEPCO press before us the claim that the Board misapplied the substantial evidence standard. Rather, PEPCO argues that both the Board

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provides for proportional compensation for partial loss of use of a member.

[6] JA 13-14.

[7] *Id.*

[8] 33 U.S.C. § 921(c).

[9] *See Atlantic & Gulf Stevedores, Inc. v. Director, Office of Wkrs' Comp. Programs*, 542 F.2d 602, 608 (3d Cir. 1976); *Presley v. Tinsley Maintenance Service*, 529 F.2d 433, 436 (5th Cir. 1976).

[10] 33 U.S.C. § 921(b)(3).

[11] JA 12.

and the ALJ erred by compensating Cross under the wrong provision of the Act. Specifically, PEPCO contends, as it did before the ALJ and the Board, that a failure to regard the scheduled benefits in Sections 8(c)(1)-(20) as exclusive remedies is an error in law. If PEPCO is correct in this respect, of course, reversal is mandated.

Analysis must commence with the general proposition that the act whose construction is at issue is remedial in nature and must be construed in light of its humanitarian objectives. In the words of the Supreme Court,

> The measure before us * * * requires employers to make payments for the relief of employees and their dependents who sustain loss as a result of personal injuries and deaths occurring in the course of their work, whether with or without fault attributable to employers. Such laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them. They are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results. * * * [12]

Yet though a liberal construction of the Act is in order, we are mindful that no court has license to rewrite this or any other act of Congress.

The Act's compensatory scheme encompasses four classes of disability: permanent total,[13] temporary total,[14]

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[12] *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 414 (1932). *Accord, Voris v. Eikel*, 346 U.S. 328, 333 (1953). *See* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 58.20 at 10-218 (1976).

[13] 33 U.S.C. § 908(a).

[14] 33 U.S.C. § 908(b).

permanent partial,[15] and temporary partial.[16] It is undisputed that Cross falls in the third category—permanent partial disability. The Act compensates disabilities of this type in one of two ways. First, in Sections 8(c)(1)-(20) the Act enumerates specific injuries—ranging from loss of an arm to disfigurement—for which the successful claimant is to receive compensation totaling two-thirds of his average weekly wages for a prescribed number of weeks. A lost arm, for example, occasions 312 weeks' compensation at that level.[17] The second method of compensation, contained in Section 8(c)(21), applies to "all other cases" and provides for compensation amounting to two-thirds of "the difference between [the claimant's] average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise * * *." [18]

PEPCO's contention that compensation based on Section 8(c)(21) is in error rests largely on its conception of the statutory scheme. Its argument, in brief, is that when Congress enumerated specific injuries in succession and then tacked on an additional provision applicable to "all other cases" it had in mind two mutually exclusive categories. This structural arrangement, according to PEPCO, makes clear that Sections 8(c)(1)-(20) represent the exclusive remedy for disabilities caused by the specified injuries. We believe, however, that there is another, more rational, way of reading the statute.

The statute defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other

[15] 33 U.S.C. § 908(c).

[16] 33 U.S.C. § 908(e).

[17] 33 U.S.C. § 908(c)(1).

[18] 33 U.S.C. § 908(c)(21).

employment." [19] Yet under the permanent partial disability classification the scheduled injuries are by their very nature considered to be compensable regardless of their concrete impact on the employee's wage-earning capacity. As the Board wrote, "The schedule * * * contemplates an easily administered system of compensation, where a claimant need not prove a loss in wage-earning capacity. Rather, the loss in wage-earning capacity is presumed without reference to claimant's actual occupation." [20] But there is another form that compensation for permanent partial disability may take—that contained in Section 8(c)(21). To establish an entitlement to compensation under this provision the claimant must prove that the injury has resulted in an actual diminution of earning capacity. Thus, although Cross's work-related injury is confined to his left knee—for which he is eligible for compensation under the scheduled benefits [21]—the injury also renders his entire body, as a functioning economic unit, permanently partially disabled. Because he is capable of establishing the actual diminution in earning capacity required for compensation under Section 8(c)(21), he is brought within that part of the compensatory scheme. Reading the statute in this way yields the conclusion that a claimant's showing of economic disability in excess of the scheduled loss is one of the "other cases" provided for in Section 8(c)(21).

The latter conception of the statutory scheme accords not only with the statute's remedial objectives,[22] but also with this court's decision in *American Mutual Ins. Co. of*

[19] 33 U.S.C. § 902(10).

[20] JA 13 (*citing Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955)).

[21] 33 U.S.C. §§ 908(c)(2), (19).

[22] *See* text at note 12 *supra*.

Boston v. Jones.[23] In *Jones* we held that the compensation for a claimant who had lost use of a hand was not to be based on the scheduled injury provision,[24] but rather on the method for computing compensation under the permanent total disability section of the statute.[25] Pointing out that "'disability' is an economic and not a medical concept," [26] we concluded that "[e]ven a relatively minor injury must lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified." [27] Although *Jones* did not deal with permanent partial disability, the reasoning it employed to free the deserving claimant from the fetters of the scheduled injury provisions applies equally here. Permanent partial disability, no less than total disability, is an economic concept whose meaning in any single case is tied inextricably to the claimant's wage-earning capabilities. Where the scheduled benefits fail adequately to compensate for a diminution in those capabilities, Section 8(c)(21) is the remedial alternative.[28]

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[23] 426 F.2d 1263 (D.C. Cir. 1970).

[24] 33 U.S.C. § 908(c)(3).

[25] 33 U.S.C. § 908(a).

[26] 426 F.2d at 1265 (*citing* 33 U.S.C. § 902(10)).

[27] *Id.* at 1266.

[28] It may be argued that the scheduled benefits at times *over*compensate a particular claimant whose wage-earning capacity has not been diminished by a scheduled injury. An attorney who loses use of an arm, for example, is presumably as capable of performing his legal functions after as before his injury, but he would nonetheless be eligible for scheduled benefits. It follows, the argument continues, that this injury, too, would be subject to compensation based on § 8(c)(21), which is to say that the hypothetically injured attorney would go uncompensated.

The apparent symmetry achieved by this argument is only superficially pleasing, however, for §§ 8(c)(1)-(20) represent a conclusive congressional determination that certain injuries entitle a claimant to benefit on grounds that he is *injured*, not on grounds that he is actually *disabled*. (The latter term, it will be remembered, is an economically tied notion under the statute.) This congressional determination in effect constructs a compensatory floor that individual claimants, such as the present one, may exceed by resort to § 8(c)(21) if able to establish a sufficient level of disability owing to the injury.

Our refusal to confine the claimant in this case to the scheduled injury provisions accords as well with the recent trend in workmen's compensation law away from the idea of exclusivity of scheduled benefits. As Professor Larson has written,

> Although it is difficult to speak in terms of a majority rule on this point, because of significant differences in statutory background, it can be said that at one time the doctrine of exclusiveness of schedule allowances did dominate the field. But in recent years there has developed such a strong trend in the opposite direction that one might now, with equal justification, say that the field is dominated by the view that schedule allowances should not be deemed exlusive, whether the issue is treatment of a smaller member as a percentage loss of a larger, or treatment of any scheduled loss as a partial or total disability of the body as a whole.[29]

Although Professor Larson relies primarily on state cases to support his observation,[30] the reasoning in those cases applies with equal force at the federal level.[31]

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[29] 2 A. LARSON, *supra* note 12, § 58.20 at 10-212 to 10-214 (footnotes omitted).

[30] *See id.* § 58.20 at 10-213 n.27 (citing cases); *id.* (Feb. 1979 Supp.) (citing cases).

[31] For an example of a state court's reasoning, *see, e.g.*, *Van Dorpel v. Haven-Busch Co.*, 350 Mich. 135, 85 N.W.2d 97, 102 (1957):

[continued]

PEPCO also contends that the exclusivity of the scheduled benefits is supported by precedent in the federal system. In particular, PEPCO relies on *Williams v. Donovan*,[32] a 1964 District Court judgment affirmed in a one-paragraph *per curiam* opinion by the Fifth Circuit. The claimant in *Williams* also suffered an injury to his knee. In authorizing compensation under the scheduled benefits, the District Court expressly endorsed the exclusivity of those benefits. The Fifth Circuit did not discuss the exclusivity issue in its brief opinion affirming.

In light of the clear trend in workmen's compensation law away from exclusivity, we simply find the District Court's conclusion in *Williams* unpersuasive.[33] Moreover,

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> [The purpose of the schedule is] to consult broad industrial experience and lay down an irreducible minimum number of weeks allowable for certain common specific losses—thus removing the issue from costly and delaying litigation at a time when the workman was most helpless and his need the greatest—leaving the question of further disability and compensation to be determined on proofs made at a hearing * * *, having due regard for the nature and extent of the injuries, the then capacities and general condition of the workman, and the kind of job he had before his injury[.] * * *

As a further indication of the clear trend away from exclusivity, the New Mexico case of *Casados v. Montgomery Ward & Co.*, 78 N.M. 392, 432 P.2d 103 (1967), on which PEPCO relies as support for exclusivity, has recently been overruled by *American Tank & Steel Corp. v. Thompson*, 90 N.M. 513, 565 P.2d 1030 (1977), which held that a schedule is not an exclusive remedy.

[32] 234 F.Supp. 135 (E.D. La. 1964), *aff'd*, 367 F.2d 825 (5th Cir. 1966) (*per curiam*), *cert. denied*, 386 U.S. 977 (1967).

[33] The Benefits Review Board, which in 1972 replaced the District Courts as initial review tribunals under the Act, *see* 33 U.S.C. § 921(b), (c), has also found the reasoning in

Williams was decided prior to this court's opinion in *Jones*, and we see nothing in the District Court's opinion to deflect the force of the reasoning in *Jones*. Drawing upon that reasoning, and upon the remedial thrust of the statute at large, we hold that a showing of economic disability in excess of the scheduled loss is one of the "other cases" provided for in Section 8(c)(21).

Accordingly, the decision of the Benefits Review Board is

Affirmed.

Williams unpersuasive in cases in addition to the one before us today. *See, e.g., Dugger v. Jacksonville Shipyards*, 8 B.R.B.S. 552 (1978); *Brandt v. Avondale Shipyards, Inc.*, 8 B.R.B.S. 698 (1978).

MACKINNON, *Circuit Judge, dissenting*: Section 8 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 908 (1976), contains a schedule of benefits in which Congress has conclusively presumed the compensation due an employee who sustains an enumerated injury in the course of his employment. Nothing in section 8 permits an employee whose injury is unquestionably confined to one of those set out in the schedule to circumvent Congress' conclusive presumptions with a showing of lost earning capacity in excess of the specified benefit. The majority holds otherwise, and does so despite the fact that during the fifty-two year old regime of an essentially unaltered statutory scheme no federal court has ever read section 8 in that manner while a number of federal courts have adopted a contrary approach. I am not unsympathetic to the result the majority's holding achieves, but I submit that it is within the province of the legislative branch to weigh and decide whether this result ought to obtain. Accordingly, I dissent.

I

The material facts in this case are not in dispute. Respondent Cross worked for the Potomac Electric Power Company (PEPCO) as a Class A cable splicer, a position in which he was able to obtain some overtime work. The concededly rigorous work of a Class A cable splicer requires one to possess the physical agility to climb ladders and scaffolds, lift heavy equipment, get in and out of manholes, and the like. In December 1974, while working in a manhole, Cross twisted his left knee and tore a cartilage which had to be surgically removed. The doctor who performed the operation later testified that the operation had been a success but that Cross had sustained a 5% partial disability of his left leg. Another physician rated Cross' disability somewhat higher—approximately 20% disability of his left leg.

When Cross returned to work he was placed on the light duty roster. While he remained listed as a Class A cable splicer and received the normal base wage PEPCO pays employees in that position, Cross no longer performed the rugged tasks in which other cable splicers engaged. He worked no overtime. Apparently in consequence of his light-duty status, PEPCO denied Cross in-grade raises awarded to other Class A cable splicers in 1975.

PEPCO and Cross were unable to agree on a method for compensating the latter's disability and so the matter was referred to an administrative law judge. Following a hearing on the claim, the administrative law judge filed findings of fact in which he recounted the testimony of the two physicians whose joint estimate rated Cross' disability as a 5% to 20% loss of use of his left leg. There was no other testimony relating to injuries Cross sustained. There was no finding that Cross' injury extended to a part of his body other than the left leg.

PEPCO contended that on this evidence the statute compelled an award under section 8(c)(2), (19), which establishes the benefits due for the partial loss of use of a leg. The administrative law judge disagreed, holding that because Cross had shown a loss of wage earning capacity (through loss of overtime and denied wages) in excess of the scheduled benefit, he was entitled to elect compensation under section 8(c)(21), which contains a formula for "other cases." Using this formula, the administrative law judge awarded Cross two-thirds of the amount of lost overtime based on Cross' earnings during the period 1972-1974.

On PEPCO's appeal, the Benefits Review Board upheld the administrative law judge's findings of fact and conclusions of law. Citing no authority other than two recent decisions of its own, the Board reasoned that "if a claim-

ant can prove a loss in wage-earning capacity greater than that provided in the schedule, he may pursue a claim under Section 8(c)(21)." It is this conception of section 8(c)(21) that PEPCO challenges here.

II

I fully agree with the majority that our chore here is to interpret a statute, not second guess resolutions of disputed fact. I concur in its view that if the Board erred in compensating Cross under section 8(c)(21), this court must reverse the Board's decision. I believe that if the majority indeed interpreted section 8(c)(21) in accordance with the ordinary rules of statutory construction, it would join in concluding that the Board erred in compensating Cross thereunder and hence that reversal of the Board's decision is required.

The touchstone of statutory construction is the language of the statute. The inquiry begins not with conjecture about what Congress would have liked to have said when it wrote the statute or with what Congress would say today given the chance, but rather with what Congress indeed expressed in the statutory text. *See* 2A C. Sands, *Sutherland Statutory Construction* § 45.07 (4th ed. 1973). The plain and ordinary meaning of the words Congress used guides this inquiry. *Richards v. United States*, 369 U.S. 1, 9 (1961); *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925). "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meaning need no discussion." *Caminetti v. United States*, 242 U.S. 470, 485 (1916); *accord, Jay v. Boyd*, 351 U.S. 345, 357 (1956); *Packard Motor Co. v. National Labor Relations Board*, 330 U.S. 485, 492 (1947). Although the identification of the ordinary meaning of a statutory term is itself an exercise in interpretation, *see* 2A C. Sands, *supra*, § 45.02, the *Caminetti* principle counsels courts to avoid exploratory frolics into

subjective policy considerations when the common and natural meaning of the words in a statute directs the court to a particular and unavoidable result.

III

There is no difficulty in identifying the meaning of the words Congress used in section 8(c) to describe the benefits due a permanently partially disabled employee who sustains a partial loss of use of one leg. The statute provides:

> Compensation for disability shall be paid as follows:
>
> . . . .
>
> (c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:
>
> . . . .
>
> (2) Leg lost, two hundred and eighty-eight weeks' compensation
>
> . . . .
>
> (19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of a member.

33 U.S.C. § 908 (1976).

The clear import of this language is that when a claimant sustains a permanent partial disability owing to the partial loss of use of a leg he is to receive two-thirds of his average weekly wage for a period corresponding to the proportion of 288 weeks which his injury bears to the loss of a leg. In this case, Cross is permanently partially disabled owing to a 5-20% loss of use of a leg.

That was the finding of the administrative law judge and there is no finding of injury beyond that. We cannot second guess his factual resolutions. Cross is thus entitled to two-thirds of his average weekly wage for a period comprising some portion of 288 weeks.

The majority's contrary result springs from section 8(c)(21), the second to last paragraph of the Longshoremen's Act's schedule of benefits. It provides:

> Other cases: In all *other* cases in this class of disability the compensation shall be 66 2/3 per centum of the difference between his average weekly wages and in wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

33 U.S.C. § 908(c)(21) (1976) (emphasis added).

This "other cases" clause certainly contains a compensatory scheme different from that applicable to the specified injuries immediately preceding it in the statute. Whereas permanently partially disabled claimants falling under the specific schedule receive two-thirds of their average weekly wages for a pre-determined period of time, permanently partially disabled claimants falling into the "other cases" provision receive two-thirds of the difference between their pre- and post-injury earning capacity for an indefinite period. But the existence of two avenues of compensation does not necessarily mean that claimants have a choice between the two. It is the availability of the choice, not the existence of two schemes, that is the issue in this case. I submit that the language of the statute is barren of any indication that the choice the majority presumes indeed exists.

The key is the underscored word "other." To my mind this word manifests that Congress intended to fashion two different schemes for two different species of permanently partially disabled claimants. The dictionary defines "other" as describing something "[d]ifferent or distinct from that already mentioned." *Black's Law Dictionary* 1253 (4th ed. 1968); *see Missouri Pacific Railroad Co. v. Campbell*, 502 S.W.2d 354, 358 (Mo. 1973); *Webster's New International Dictionary* 1729 (2d ed. 1959). The "all other cases" to which section 8(c)(21) applies refers to cases "different or distinct" from cases already mentioned, namely, the cases set out in the schedule. If the injury is one described in the schedule, then the benefits mandated therein control; if the injury is different or distinct from one set out in the schedule, then the "other cases" provision controls.

The "other cases" provision has an important but limited role to play in workmen's compensation. The schedule of benefits contained in section 8(c) does not exhaust the range of conceivable work-related injuries. Reflecting the primary concerns of the industrial age in which it was adopted, the enumerated injuries schedule focuses on anatomical losses such as arms, legs, hands, fingers, toes, and the like. The schedule makes no specific provision for injuries such as a heart attack, a hernia, a back impairment, a cancer, or a mental disorder. Rather than attempt to anticipate and itemize every imaginable work-related misfortune that innumerable employment conditions might engender, Congress needed a catch-all provision to encompass claims based on injuries not identified in the schedule. Hence the "other cases" provision. Insofar as the provision concerns us on the facts of this case, the words "other cases" really mean "heart attack cases," "hernia cases," and other non-scheduled injuries.

I would hold that only a finding of an injury different from or more extensive than one of those specified in the schedule triggers the "other cases" provision. There being no such finding here, I would vacate the Board's order.

IV

The legislative history of the Longshoremen's Act contains no clear answer to the question at bar, but I think it is fair to infer from that history that Congress did not intend the construction the majority endorses. Congress enacted the Longshoremen's Act in 1927. Act of March 4, 1927, Pub. L. No. 803, chap. 509, 44 Stat. 1427. The proposal that ultimately became law was introduced in the Senate the year before as S.3170. As recommended by the Senate Committee and adopted by the Senate, S.3170 had no schedule of benefits. *See* 67 Cong. Rec. 10614 (1926). The bill instead provided that the compensation provisions of the Federal Employees Compensation Act would control. S. Rep. No. 973, 69th Cong., 1st Sess. 2-3 (1926); 67 Cong. Rec. 10614 (1926) (remarks of Sen. Walsh). At that time, the Federal Employees Compensation Act provided for compensation on the basis of two-thirds of the difference between the claimant's pre- and post-injury earning capacity. *See* 5 U.S.C. §§ 754, 756 (1926 ed.) (enacted as Act of September 7, 1916, Pub. L. No. 267, chap. 258, § 4, 39 Stat. 743).

The House Committee did not accept the earning capacity provision and amended S.3170 to include a schedule of benefits. H.R. Rep. No. 1767, 69th Cong., 2d Sess. 4 (1927); 68 Cong. Rec. 5404 (1927). The Report accompanying this change explained that the Committee had reshaped the Senate bill along the lines of a House proposal that the Committee had recommended for passage the year before. H.R. Rep. No. 1767, *supra*, at 20. The House Committee Report on that earlier proposal revealed that the provisions of the bill had been borrowed from the New York workmen's compensation statute. H.R. Rep. No. 1190, 68th Cong., 2d Sess. 2 (1926); *see Travelers Insurance Co. v. Cardillo*, 225 F.2d 137, 143

(2d Cir.), *cert. denied*, 350 U.S. 913 (1955); 68 Cong. Rec. 5412 (1927) (remarks of Rep. O'Connor). The New York statute, like the House Committee version of S.3170, contained a schedule of benefits and an "other cases" clause. *Compare* N.Y. Workmen's Compensation Law § 15(3), ¶ v (1927) *with* H.R. Rep. No. 1767, *supra*, at 4. The House adopted the House Committee version, 68 Cong. Rec. 5414 (1927), and the Senate concurred in the bill as amended, *id.* at 5909.

Three features of the foregoing are noteworthy. First, Congress rejected a compensatory scheme for all injuries solely based on lost earning capacity. It opted instead to specify particular injuries and thereby to create a conclusive presumption on the benefits due a claimant who sustains a scheduled injury. This reflects a desire to avoid a case-by-case determination in situations involving what were then the most common industrial injuries. Second, this effort to avoid case-by-case contention of benefits is consistent with the statute's overall goal of putting an end to the costly and time-consuming actions for damages at common law. This concern and the parallel concern of administrative orderliness that is crucial to understanding the concept of scheduled benefits permeate the sparse record of legislative deliberations. *See, e.g.*, H.R. Rep. No. 1767, *supra*, at 19-20; 68 Cong. Rec. 5410 (1927) (remarks of Rep. Graham). Third, the federal statute, and in particular the schedule of benefits, was lifted from the New York statute. Although New York's understanding of what its statute means is not binding on us, it is certainly probative of what Congress believed it was adopting when it imported New York's schedule into the federal scheme. In a decision issued not long after Congress adopted the New York schedule in the Longshoremen's Act, the New York Court of Appeals found self-evident the answer to the question this court confronts today:

> Obviously, the phrase "in all other cases" signifies that the provisions of the paragraph shall apply only in cases where the injuries received are not confined to a specific member or specific members.

Sokolowski v. Bank of America, 184 N.E. 492, 494 (N.Y. 1933).

The construction of the "other cases" provision in section 8(c)(21) that the majority reaches contradicts each of these features of the legislative history of the Longshoremen's Act. Ignoring Congress' rejection of a provision which would have permitted Cross compensation solely based on proof of lost earning capacity, the majority fashions precisely such a provision out of the "other cases" clause. Neglecting to note that the purpose underlying the compensation laws was to put an end to administratively burdensome and litigious confrontations on the amount of compensation due an employee for a specified injury, the majority supports an interpretation of the "other cases" provision which opens the door to case-by-case determinations of benefits Congress conclusively presumed in the schedule. And, finally, the majority's interpretation flouts the "obvious" meaning given the "other cases" clause contained in the statute on which the Longshoremen's provision was based.

Congress has amended the Longshoremen's Act a number of times since 1927. *See, e.g.*, Act of October 27, 1972, Pub. L. No. 92-576, 86 Stat. 1252; Act of July 26, 1956, Pub. L. No. 84-803, 70 Stat. 655; Act of June 24, 1948, chap. 623, 62 Stat. 602; Act of June 25, 1938, chap. 685, 52 Stat. 1164; Act of May 26, 1934, chap. 354, 48 Stat. 806. *The "other cases" provision, however, remains unchanged since its original enactment in 1927.* Congress has referred to the provision on at least two occasions in amending other provisions of the statute, and these two comments support an interpretation based on the plain meaning of the words in section 8(c)(21).

In 1938, Congress amended the statute to include the current section 8(h), which specifically relates to the computation of wage earning capacity under section 8(c)(21). Act of June 25, 1938, chap. 685, § 5, 52 Stat. 1165 (codified at 33 U.S.C. § 908(h) (1976)). Both the House and the Senate Reports on the proposed legislation expressed alarm at the "wasteful litigation" which "other cases" claims under section 8(c)(21) frequently occasioned, and both used the example of an "industrial hernia," a non-schedule injury, to describe the kind of cases falling into that category. *See* S. Rep. No. 1988, 75th Cong., 3d Sess. 5 (1938); H.R. Rep. No. 1945, 75th Cong., 3d Sess. 5 (1938). There is no indication in these reports that Congress intended the "other cases" provision to extend to claims based on injuries specified in the schedule.

In the most recent amendment of the statute in 1972, Congress clarified the "second injury" provisions, adopting different benefits for scheduled and nonscheduled injuries. In referring to the benefits available in situations compensable under section 8(c)(21), the House Report explained that "[i]n the case of injuries *not described in section 8(c)(1)-(20)*" certain benefits would obtain. H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 18 (1972) (emphasis added). This indicates Congress' understanding that the "other cases" provision included only injuries "not described in" the schedule.

V

Congress is no stranger to the problem we confront here of a permanently partially disabled claimant whose lost earning capacity from a scheduled injury is not fully redressed by the scheduled benefit, for Congress amended the Federal Employees' Compensation Act to accommodate precisely this concern.

As noted above, when originally enacted the Federal Employees Compensation Act did not contain a schedule

of benefits; it compensated claims based on all injuries with the same formula section 8 of the Longshoremen's Act confines to "other cases." In 1949 Congress amended the statute to provide for scheduled benefits for permanent partial disability. Act of October 14, 1949, chap. 691, § 104, 63 Stat. 855. The Committee reports accompanying the measure in each chamber stated that this change was intended to bring the statute in line with the prevailing practice in most American jurisdictions. S. Rep. No. 836, 81st Cong., 1st Sess. 17 (1949); H.R. Rep. No. 729, 81st Cong., 1st Sess. 7 (1949); *see* 95 Cong. Rec. 8756 (1949) (remarks of Rep. Keating). One Senate sponsor of the bill noted that the schedule was to conform to the one contained in the Longshoremen's Act. 95 Cong. Rec. 13607 (1949) (remarks of Sen. Douglas).

There was one important addition in the 1949 amendments which distinguishes the Federal Employees Compensation Act from the Longshoremen's Act. The House Committee Report on the 1949 amendments explained:

> The [House] bill adopts . . . the most frequently used . . . approach [to workmen's compensation for permanent partial disability] which consists of a schedule for such particularized permanent disability and for facial disfigurement, *but with one important modification.* If the injury results in permanent major impairment, such as total loss or loss of use of an arm, hand, leg, foot, or eye, or total loss of hearing in both ears, a scheduled indemnity would, in most cases, be seriously inadequate. To overcome this inadequacy, *an employee suffering such serious injury to a member or function would, upon expiration of the compensation period specified in the special schedule, be protected against continued disability and impairment of his wage-earning capacity at the regular compensation rate applicable to such continued disability like other disabled employees. In*

> *these major injury cases, the schedule of compensation would thus be minimal rather than exhaustive; . . .*

H.R. Rep. No. 729, *supra*, at 7 (emphasis added); *see* 95 Cong. Rec. 8755 (1949) (remarks of Rep. McConnell). The Senate version was to the same effect. *See* S. Rep. No. 836, *supra*, at 17-18.

The Federal Employees Compensation Act as amended in 1949 did not contain an "other cases" provision identical to the one in the Longshoremen's Act, but it did have a provision which operated the same way to cover cases not falling in the schedule. Despite this, Congress plainly assumed that the recovery for claims based on injuries contained in the schedule would be confined to the benefits therein described. Congress recognized that these benefits would not always compensate for lost earning capacity, and further recognized that some *legislative* action was required if claimants suffering *scheduled injuries* were to be eligible for benefits beyond that set out in the schedule. It therefore incorporated "one important modification" in the amendments which represented a departure from the "most frequently used" approach to compensating permanent partial disabilities arising from scheduled injuries. Even with this modification, a claimant must first go to the schedule that conclusively presumes the amount of recovery due him, and only after he receives the scheduled amount can he seek additional compensation.

In 1966 Congress again amended the Federal Employees Compensation Act to extend the modification to encompass claims based on scheduled injuries other than those involving the total loss of a member. Act of September 6, 1966, Pub. L. No. 89-554, 80 Stat. 536. Under this amendment, claimants covered by the statute who, like Cross, suffer the partial loss of use of a member are entitled to the minimum compensation contained in the

schedule and can thereafter recover benefits for continuing lost earning capacity. The history of this amendment exhibits Congress' understanding that absent legislative action the scheduled benefit represented the outward limit on the compensation due an employee whose claim derives from an injury set out in the schedule. For example, the Senate Report observed:

> *Under existing law, certain persons suffering from specified permanent injuries (mostly the loss, or loss of use, of a member) are entitled to receive compensation for a specified number of weeks.* If the employee has suffered a permanent partial loss, or partial loss of use, of the member listed in the schedule, but no other significant impairment of the body, *he receives no further compensation after his scheduled award is exhausted.* On the other hand, if he has received a partial loss or partial loss of use, of a listed member and has also suffered a significant impairment in a part of the body not listed in the schedule, he can be compensated for loss of wage-earning capacity, if any, but not for the scheduled loss. The committee's amendment treats the person with a scheduled partial loss, whether or not accompanied by another disability, as the act now treats persons suffering total loss or total loss of use of a member—*by allowing them the scheduled injury in each case, and by providing for compensation based on loss of wage-earning capacity after the scheduled award has been paid out.*

S. Rep. No. 1285, 89th Cong., 2d Sess. 3 (1966) (emphasis added); *see* H.R. Rep. No. 1304, 89th Cong., 2d Sess. 3 (1966) (to the same effect).

In the most recent amendment of the Federal Employees Compensation Act Congress adopted a formula the effect of which was to extend the benefits of a scheduled award to claimants who would otherwise be compensated under that statute's version of the "other cases" provision. Act of September 7, 1974, Pub. L. No. 93-416, § 4, 88 Stat. 1144. Congress once again indicated its understanding that claimants with injuries specified in the schedule would be confined to compensation described therein absent some explicit provision permitting compensation in addition to the scheduled benefit. *See* H.R. Rep. No. 1025, 93d Cong., 2d Sess. 4 (1974). This is particularly clear in one reference made in the Senate Report. The 1974 amendments permitted the Secretary of Labor to include non-scheduled injuries other than those Congress identified under the new schedule formula. The Senate Committee expressed its understanding that these other injuries would "not include any organ already included within the Act's existing schedule of compensation." S. Rep. No. 1081, 93d Cong., 2d Sess. 5 (1974).

Hence when Congress intended a type of benefit for permanent partial disability set out in a schedule to be only a part of or alternative to other remedies, it has been able to express that intent. The same Senate and House Committees that have jurisdiction over the Federal Employees Compensation Act have jurisdiction over the Longshoremen's Act. *Compare* S. Rep. No. 1081, *supra*, (Federal Employees Compensation Act) *and* H.R. Rep. No. 1025, *supra*, (same) *with* 118 Cong. Rec. 30397 (1972) (Longshoremen's Act) *and* H.R. Rep. No. 1441, *supra*, (same). *See generally Senate Manual*, 95th Cong., 1st Sess. 36-37 (1977); Brown, *Rules of the House of Representatives* 333-34 (1979). A claimant under the Federal Employees Compensation Act can do what Cross effectively seeks to do under the Longshoremen's Act, namely, obtain the benefit of the scheduled payment supplemented by two-thirds of the difference in his lost earning capacity. The difficulty for Cross is that he works for PEPCO, not the federal government, and the Longshoremen's Act, as opposed to the Federal Employees Compensation Act, does not permit him to receive the

compensation he seeks. When Congress intends a different result, it will modify the statute.

VI

As noted, Congress enacted the "other cases" provision fifty-two years ago and has not changed it since. In the over half-century since 1927, no federal court has ever construed section 8(c) to provide two alternative compensation schemes for permanent partial disability claims based on injuries unquestionably confined as a matter of fact to members contained in the schedule. Conversely, every federal court that has considered this issue has either expressly or impliedly held that a claimant's wage-earning capacity is irrelevant when his claim is based on an injury specified in the schedule. This is especially apparent in cases dealing with whether a *lack* of loss of wage-earning capacity deprives the claimant of the scheduled benefit. *See, e.g., Bethlehem Steel Co. v. Cardillo*, 229 F.2d 735 (2d Cir. 1955), *cert. denied*, 351 U.S. 950 (1956); *Travelers Insurance Co. v. Cardillo, supra*, at 144; *Gulf Stevedore Corp. v. Hollis*, 298 F. Supp. 426 (S.D. Tex. 1969), *aff'd per curiam*, 427 F.2d 160 (5th Cir.), *cert. denied*, 400 U.S. 831 (1970); *Cox v. American Store Equipment Corp.*, 283 F. Supp. 390 (D. Md. 1968). Because the majority holds that wage-earning capacity can be relevant to a claim based on a scheduled injury, and because nothing in its analysis of the statute logically confines the relevance of wage-earning capacity to situations in which the claimant has actually suffered a loss, the majority effectively overrules the reasoning of this unbroken string of cases.

Two federal cases bearing on the issue here are illustrative. One is *Williams v. Donovan*, 234 F. Supp. 135 (D. La. 1964), *aff'd per curiam* 367 F.2d 825 (5th Cir. 1966), *cert. denied*, 386 U.S. 977 (1967). In that case, the employee injured his knee during the course of his

employment. The testimony indicated that he had sustained a permanent partial loss of use of his leg. Compensation was awarded on the basis of the scheduled benefit. The employer argued that this method of compensation was in error because he was entitled to elect recovery under the "other cases" provision. The court categorically rejected the argument, reasoning on the basis of the statute that "it is evident that when considering compensation in a case of permanent partial disability, the form and language of the Act dictate that the wage-earning capacity test be applied *only in those "other cases" not listed in the schedule.*" *Id.* at 139 (emphasis added).

Williams is on all fours with this case. The majority rejects its reasoning without discussing it, partly on the basis of the brevity with which the Fifth Circuit affirmed it and partly on the basis of an ostensible trend in some other workmen's compensation laws. This trend is discussed below, but concerning the majority's attempt to minimize the case on the basis of the length of the Fifth Circuit's affirmance, it is noteworthy that the use of a brief per curiam to affirm a district court opinion ordinarily indicates that the appellate court is completely in accord with the reasoning of the trial court. Moreover, speculation about the Fifth Circuit's position is unnecessary, for that court had the opportunity to reassess *Williams* as recently as several months ago, and expressly declined to do so. In *Jacksonville Shipyards, Inc. v. Dugger*, 587 F.2d 197 (5th Cir. 1979) (per curiam), the employer argued that because the claimants' injury fell within section 8(c)'s schedule, his compensation was confined to the benefit specified therein. As indicated, this has been the universal rule where compensation for permanent *partial* disability has been in issue. The Fifth Circuit rejected the argument because the claimant had demonstrated his disability was permanent and *total*, a situation which rendered the schedule irrelevant. *Wil-*

Iloms, the court of appeals said, was "consistent with our holding here" because in that case "the claimant was suffering from a partial disability, resulting from an injury to a specific member." *Id.* at 198. Thus a claimant can always show that his disability is total rather than partial, but if that latter is the case, then his compensation is determined by the schedule if his injury is confined to one of those specified therein.

Another case of note is *Flamm v. Hughes*, 329 F.2d 378 (2d Cir. 1964), in which the plaintiff claimed that section 8 erects "unconstitutional distinctions among various types of injuries in that it provides a specific schedule of compensation for a limited number of weeks for those injuries resulting in permanent partial disability which are explicitly enumerated in that provision but fails to provide for compensation in accordance with such schedules for permanent partial disability resulting from a combination of injuries not explicitly enumerated." *Id.* at 380. The precise issue for the Second Circuit was whether the district court erred in declining to convene a three-judge court to consider the question. The court of appeals affirmed on the ground that the plaintiff had failed to raise a substantial federal question. The claim was without merit because Congress "enjoys great latitude in promulgating a statutory scheme for the compensation of workers" and it did not act irrationally in deciding "to provide a specific schedule of compensation limited to a prescribed number of weeks for enumerated permanent partial disabilities and yet provide compensation for an indefinite period of time for all other injuries leading to permanent partial disability." *Id.* The unarticulated predicate for Judge Lumbard's opinion for the Second Circuit was that the two schemes were mutually exclusive as between each other; otherwise the issue would never have been raised. And the predicate was unarticulated because the language of the statute made the proposition so clear.

VII

Lacking support in the statute, the legislative history, or the case law for its unique interpretation of section 8(c), the majority opts to rely on three general principles often invoked in workmen's compensation cases. In my view this reliance is misplaced.

A

First the majority cautions that the Longshoremen's Act, being a remedial statute, must be construed in light of its humanitarian purposes. It later concludes that its construction of section 8(c) is in accordance with this tenet of statutory construction.

I do not disagree with the general proposition that a remedial statute must be construed with its remedial purposes in mind, though the proposition is itself little more than a restatement of the principle that congressional intent guides the construction of a statute. If Congress intended the statute to provide a remedy, then courts must read the statute to achieve that congressional intent. The principle usually comes into play when the applicability of the statute is in question, that is, when the court must determine whether the statute covers a particular individual or circumstance. *See* 3 C. Sands, *supra*, § 72.05.

In this case we are unconcerned with whether Cross is covered by the statute; everyone agrees that he is. The question is how shall he be compensated. That a court must construe a statute with its remedial purposes in mind does not give a court, as the majority acknowledges, a "license to rewrite this or any other act of Congress." Maj. Op. at 5. Nor does it mean that the language in the statute is to be construed beyond all reason to ensure the claimant the largest conceivable award the statute offers. Rather courts are confined to what the statute

can fairly be read to mean. If there is an element of ambiguity, then perhaps the majority's general proposition can sway a court in the direction of the broader meaning. But using every intrinsic and extrinsic aid to statute construction at a judge's command, I can find no ambiguity. Only by ignoring the language and history of the statute can the court achieve the result it does. This undermines the foundation of the proposition on which the majority relies—that congressional intent governs construction of a statute.

B

Next the majority stresses that "disability" is an "economic concept" rather than a medical one. To the majority this means that wage-earning capacity rather than physical injury governs compensation for disability. Fearful that this analysis might lead to a two-way street through section 8(c)(21) whereby a scheduled injury might go uncompensated if the employer can show no loss of wage-earning capacity, the majority contends that section 8(c)(1)-(20), the schedule, represents "a conclusive congressional determination that certain injuries entitle a claimant to benefit on grounds that he is *injured*, not on grounds that he is actually *disabled*." Maj. Op. at 8 n.28 (emphasis in original). Thus for the majority disability is exclusively an economic concept while at the same time compensation for permanent partial disability based on scheduled injuries is exclusively a medical concept. This is confusion compounded.

Earlier I stated that nothing in the majority's analysis logically confines the relevance of wage-earning capacity to situations in which the claimant who has sustained a scheduled injury actually suffers a loss in earning capacity, *i.e.*, that the majority is creating precisely the two-way street through section 8(c)(21) which it purports to disclaim. This assertion is borne out by examination of the majority's treatment of disability as an "economic concept," for that treatment displays a very basic misunderstanding of the concept of disability and its relationship to the schedule of benefits in the Longshoremen's Act.

Disability is neither exclusively economic nor exclusively medical in character; it draws from both. *See* 2 A. Larson, *The Law of Workmen's Compensation* § 57.10 (1976). To measure all compensation in terms of lost earning capacity would create a disincentive for the medically disabled employee who is able and eager to return to work. To measure all compensation in terms of physical injury would penalize the economically disabled employee who is eager but unable to return to his earlier job. Congress has long recognized the trade-offs involved in fashioning an administratively feasible system of compensation which accommodates both of these interests within reasonable limits. *See, e.g.*, H.R. Rep. No. 729, *supra*, at 7-8; S. Rep. No. 836, *supra*, at 17-18. The system Congress adopted defines disability in terms of wage-earning capacity, *see* 33 U.S.C. § 902(10) (1976), but there are always two facets to a compensable disability: physical injury *and* an inability to earn wages.

The majority's principal error lies in its efforts to reconcile the definition of disability with the existence of a schedule of benefits based solely on physical injury. As noted, confronted with this seemingly disparity, the majority declares that the schedule is designed to compensate for an injury, thus contradicting its insistence on disability as an exclusively economic concept. The disparity the majority fears, however, does not exist, and thus the confusion surrounding its attempts at reconciliation is unnecessary. The existence of scheduled benefits solely based on physical injury is wholly consistent with the definition of disability solely based in economic terms because the purpose of the schedule is to set out *con-*

clusive presumptions on *lost earning capacity* for specified injuries. Professor Larson explains it this way:

> [The immateriality of lost wage earning capacity to determination of scheduled benefits] is not . . . to be interpreted as an erratic deviation from the underlying principle of compensation law—that benefits relate to loss of earning capacity and not to physical injury as such. The basic theory remains the same; the difference is that the effect on earning capacity is a conclusively presumed one, instead of a specifically proved one based on the individual's actual wage-loss experience. . . . To avoid . . . protracted administrative task[s], the apparently cold-blooded system of putting average-price tags on arms, legs, eyes, and fingers has been devised.

2 A. Larson, *supra*, § 58.11.

Hence the schedule of benefits is not only "a conclusive congressional presumption that certain injuries entitle a claimant to benefit on grounds that he is injured," it is a conclusive congressional presumption that the injury creates a disability entitled to the specified amount as compensation. "Congress has determined that a loss of wage-earning capacity *and its extent* are conclusively established when one of the enumerated physical impairments is proven to have arisen out of employment." *Travelers Insurance Co. v. Cardillo*, *supra*, at 144 (emphasis added). A conclusive presumption cannot be rebutted by any evidence, either of a greater or lesser loss of earning capacity; it is positive law. The majority's view transforms the presumption into one rebuttable by a claimant with evidence of lost earning capacity in excess of the scheduled benefit. Because heretofore the schedule itself represented final congressional judgments on the extent of the loss of earning capacity (rather than the effects of the physical injury), there is no reason why an employer cannot hereafter rebut the presumption of a

scheduled loss with evidence of a lack of lost earning capacity. Hence my conclusion on the two-way street the majority paves through section 8(c)(21).

Confining a claimant who sustains an enumerated injury to the compensation contained in the schedule does no violence to the idea that disability is an economic concept. Instead it neatly accords with that idea. The majority's quarrel essentially is with Congress' determination to establish a conclusive presumption on the amount of wages a claimant has lost by devising a "cold-blooded system of putting average price-tags" on specific body members. Absent questions of constitutional dimension, however, it is not within our power to quarrel with congressional judgments.

C

Finally the majority observes that the current trend in workmen's compensation law leans toward a notion that scheduled benefits are non-exclusive. Relying on state cases and Professor Larson's treatise, the majority concludes that its reading of section 8(c)(21) best accords with this trend.

Assuming for argument that such a trend exists and can be considered by this court, I question whether it has any application to this situation. The examples Professor Larson uses all involve cases in which a claimant with a scheduled injury is found as a matter of fact to suffer either from a permanent total disability or from a permanent partial disability that *extends to other parts of the body*. *See* 2 A. Larson, *supra*, § 58.20 at 10-196. Thus, for example, if a claimant suffers a specified injury which renders him incapable of working at all, this trend favors him recovering for permanent total disability.

This was the situation involved in *American Mutual Insurance Co. v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970),

a case on which the majority relies. The claimant in *Jones* was "a 63-year-old man of limited intelligence whose only past work ha[d] been as a laborer." *Id.* at 1265. He sustained a work-related injury to his hand which resulted in the loss of use of that hand for all but the lightest work. He was unable to find work for several years. The employer argued that because the injury was scheduled, the claimant was confined to compensation under the schedule of benefits for permanent partial disability. The claimant, noting that the statute contained only a partial listing of injuries and provided that [i]n all other cases permanent total disability shall be determined in accordance with the facts," 33 U.S.C. § 908(a), argued that nonmedical evidence was admissible to show that he in fact suffered from a disability permanent in quality and total in character. This court agreed.

The holding in *Jones* is consistent both with the idea of disability as an economic concept and with the express language of the statute relating to permanent total disability. The claimant there was not trying to recover for a heart attack or a hernia when his injury was to his hand; he was arguing that the injury to his hand *totally* disabled him in light of his age, work skills and experience, and ability to obtain employment. In *Jacksonville Shipyards, Inc. v. Dugger*, *supra*, the Fifth Circuit had no difficulty reconciling *Jones*, which it followed, and *Williams*, which held the schedule to be exclusive (in relation to the "other cases" clause) when only a permanent partial disability was involved. Section 8 says that the "facts"—medical and economic—determine permanent total disability; it conclusively presumes compensation for a scheduled injury permanent in quality and partial in character.

It is noteworthy that the two state cases the majority cites, *Van Dorpel v. Haven-Busch Co.*, 350 Mich. 135, 85 N.W.2d 97 (1957), and *American Tank & Steel Corp.*

v. Thomson, 90 N.M. 513, 565 P.2d 1030 (1977), involved the same fact situation as *Jones*. The majority cites no cases applying the nonexclusivity trend to an "other cases" provision in a situation like the one at bar where the only finding of fact is that the injury was confined to the leg. As noted, Professor Larson does not relate the nonexclusivity trend to "other cases" provision. He notes several states which follow the trend, but some of these states have rejected extension of the nonexclusivity trend to other cases. *E.g., compare Jaynes v. Industrial Commission*, 436 P.2d 172 (Ariz. App. 1968) (cited in 2 A. Larson, *supra*, § 58.20) (injury to leg which produces arthritis compensable under "other cases") *and Corbus Spring Service v. Cresswell*, 359 P.2d 219 (Okla. 1961) (cited in 2 A. Larson, *supra*, § 58.20) (injury to leg which extend to back compensable under "other cases") *with LaRue v. Ashton Co.*, 406 P.2d 451 (Ariz. App. 1965) (injury confined to leg compensable only under schedule) *and Thomas Concrete Products v. Robertson*, 485 P.2d 1054 (Okla. 1971) (injury confined to specific scheduled member compensable under schedule only).

Although the majority construes Larson to grant the claimant the advantage in every scheduled injury case, Professor Larson himself understands that the existence of a schedule causes disadvantages in some situations. *See* 2 A. Larson, *supra*, § 58.13 at 10-174. Other treatises directly address the "other cases" situation and render conclusions consistent with the plain meaning of the statute. *See, e.g.*, 11 *Schneider's Workmen's Compensation* § 2311 at 493 (3d ed. 1958) ("the ['other cases'] clause refers to a disability resulting from an injury to some portion of the body or usefulness of some physical function not mentioned in the schedule for specific loss or loss of use"); 99 C.J.S. *Workmen's Compensation* § 307 (1958) (an injury specifically covered by the schedule is not compensable under the "other cases" provision). Thus the trend the majority seeks to promote likely is inapposite in this situation.

Assuming for argument the trend has some application here, it is no substitute for legislation. We do not owe our allegiance to the latest fad, but to congressional intent. Thus whatever the current rage may be it supplies no warrant for ignoring the language of the statute. The majority's reasoning vests *new* congressional intent in a statute enacted fifty-two years ago. Congress has indicated that it will undertake efforts to conform workmen's compensation law "to the latest thinking in the area." H.R. Rep. No. 1025, *supra*, at 1; *see* S. Rep. 1081, *supra*, at 1. We should let Congress continue those efforts; we have no choice.

VIII

The facts indicate that Cross sustained an injury to his leg alone. The plain meaning of the statute confines recovery for such an injury to the benefits contained in the schedule. Neither the text of the statute nor its legislative history supports the majority's interpretation of the "other cases" provision. Instead, the legislative history of the Longshoremen's Act and the Federal Employees Compensation Act exhibits Congress' understanding that the "other cases" provision is confined to disabilities based on injuries not mentioned in the schedule. Every federal court that has considered the question has so concluded; no federal court has reasoned otherwise. The idea of "disability" as an economic concept is totally consistent with an interpretation of the statute which is faithful to its plain meaning. Nothing in the tenets of statutory construction or the trends in workmen's compensation law counsels a different construction. It is for Congress to make the policy judgments required to permit Cross to recover for lost wage earning capacity on the basis of an injury for which Congress has conclusively presumed the amount of that loss.

I would vacate the Board's order with directions to compensate Cross under section 8(c)(2), (19).

APPENDIX B

Decision of the Benefits Review Board, Department of Labor

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
Washington, D.C. 20210

BRB No. 77-261

TERRY M. CROSS, JR., *Claimant-Respondent*

v.

POTOMAC ELECTRIC POWER CO., *Employer-Petitioner*

DECISION

Appeal from the Decision and Order of Edwin S. Bernstein, Administrative Law Judge, United States Department of Labor.

Leslie Scherr (Margolis, Davis & Finkelstein), Washington, D.C., for the claimant.

Richard W. Turner (Hamilton & Hamilton), Washington, D.C., for the employer.

Before: Smith, Chairman, Hartman and Miller, Members.

Hartman: Member:

This is an appeal by the employer from a Decision and Order (76-LHCA-144) of Administrative Law Judge Edwin S. Bernstein pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, as extended to the District of Columbia by the District of Columbia Workmen's Compensation Act, 36 D.C. Code § 501 *et seq.* (hereafter referred to as the Act).

Claimant was employed as a cable splicer by employer. In the course of his duties, claimant would life heavy cables and equipment, work on scaffolding 20 to 30 feet high, work in confined areas, and climb in and out of manholes. On December 7, 1974, claimant tore the medial meniscus in his left knee during the course of his employment.

This injury required surgery. Claimant returned to work on March 17, 1975. Since returning to work, he has not performed his former duties. Rather, he has performed light duty, such as taking care of equipment at one of employer's warehouses and "touring" employer's Washington, D.C., service building inspecting trucks and other equipment. Employer has continued to pay claimant as a class A cable splicer. However, he has lost a considerable amount of overtime and several raises because he no longer actively works as a cable splicer.

There was disagreement at the hearing as to whether claimant's medical condition prevented him from returning to his former duties. The administrative law judge concluded that claimant could not at the present time return to those duties because of residuals from his injury. This conclusion is supported by substantial evidence in the record and, therefore, must be accepted by the Board.

The administrative law judge determined that claimant suffered a loss in wage earning capacity under Sections 8(c)(21) and 8(h) of the Act, 33 U.S.C. §§ 908(c)(21), 908(h), as a result of his injury, and benefits were awarded accordingly.

Employer appeals contending that claimant's compensation for the loss of use of his leg should have been limited to a scheduled award under Sections 8(c)(2) and 8(c)(19) of the Act, 33 U.S.C. §§ 908(c)(2), 908(c)(19), based solely on the degree of medical impairment or, alternatively, based on a degree of impairment that took both medical and economic factors into consideration.

The structure of the schedule under the Act, Sections 8(c)(1)-8(c)(19), clearly contemplates a system where a stated number of weeks of compensation shall be paid for the total loss, or total loss of use, of a member. A proportionate number of weeks of compensation shall be paid for a *medically* determined degree of loss of use of a member. The schedule by its nature contemplates an easily

administered system of compensation, where a claimant need not prove a loss in wage-earning capacity. Rather, the loss in wage-earning capacity is presumed without reference to claimant's actual occupation. *Traveler's Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955).

However, under the Act, the schedule is not exclusive. In keeping with the humanitarian purpose of the Act, if a claimant can prove a loss in wage-earning capacity greater than that provided by the schedule, he may pursue a claim under Section 8(c)(21) or Section 8(a). *See Mason v. Old Dominion Stevedoring Corp.*, 1 BRBS 357, BRB No. 74-182 (March 21, 1975); *Longo v. Universal Terminal & Stevedoring Corp.*, 2 BRBS 357, BRB No. 75-135 (October 16, 1975). Claimant, in this case, sustained an injury that the record indicates caused a loss in wage-earning capacity greater that that for which the schedule would have compensated him, this injury, therefore, warrants a continuing award under Section 8(c)(21). Of course, if at a future date the residuals of the claimant's injury lessen or disappear, employer has the option of seeking modification. A finding of permanent disability at this time does not preclude modification for a subsequent change of condition. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968).

Accordingly, the Decision and Order of the administrative law judge is affirmed.

/s/ RALPH M. HARTMAN
Ralph M. Hartman, Member

/s/ SAMUEL J. SMITH
Samuel J. Smith, Chairman

/s/ JULIUS MILLER
Julius Miller, Member

We Concur:

Dated this 29th day of November, 1977

SERVICE SHEET

BRB No. 77-261: TERRY M. CROSS, JR. v. POTOMAC ELECTRIC POWER COMPANY (Case No. 76-DCWC-144)

A copy of this Decision was sent to the following parties:

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APPENDIX C

Decision and Order of the Administrative Law Judge

U.S. DEPARTMENT OF LABOR
OFFICE OF ADMINISTRATIVE LAW JUDGES
Suite 700 - 1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 76-DCWC-144

OWCP No. 40-90347

In the Matter of

TERRY M. CROSS, JR., *Claimant*

v.

POTOMAC ELECTRIC POWER COMPANY, *Employer*
SELF-INSURED

Leslie Scherr, Esquire
Margolius, Davis, Finkelstein & Karlin
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

For the Claimant

Richard W. Turner, Esquire
Hamilton and Hamilton
Union Trust Building
Washington, D.C. 20005

For the Employer

Before: EDWIN S. BERNSTEIN
Administrative Law Judge

DECISION AND ORDER

This is a claim for compensation under the District of Columbia Workmen's Compensation Act which embodies the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq. ("the Act").

Findings of Fact

On December 7, 1974, Claimant sustained an accidental injury which arose out of and occurred in the course of his employment with the Employer. He was paid temporary total disability compensation until March 17, 1975 when he returned to work. The claim is for permanent partial disability. At issue are the degree of Claimant's disability and amount of compensation.

Claimant began working for the Employer as a Cable Splicer Helper in 1961 and by 1972 he had become a Class A Cable Splicer. This job requires the employee to be in top physical condition. A Class A Cable Splicer must climb up and down ladders in connection with working in manholes and on scaffolds; must bend and twist his body as he works in confined areas; must lift heavy cables and heavy equipment; and must twist cables on scaffolds 20 to 30 feet high. It is rugged work.

On December 7, 1974 while working in a manhole, Claimant sustained a torn medial meniscus of the left knee. Following surgery and recuperation, Claimant returned to work on March 17, 1975. He was placed on light duty and has remained on light duty since that time.

Claimant testified that he experiences pain, discomfort, swelling and buckling of his left knee when he is on his legs for a long period of time, as when he goes shopping and contends that he can no longer perform the rigorous work of a Class A Cable Splicer for fear of endangering himself or others such as when he is working on a scaffolding.

Dr. Kent Peterson, the orthopedic surgeon who operated on Claimant, felt that Claimant made a successful recovery and had but a five percent partial disability of the leg. Dr. Robert E. Collins, a board certified orthopedic surgeon found that Claimant had a 20 percent disability of the leg and concluded that Claimant would experience considerable

pain, discomfort, and aggravation to his leg should he attempt to return to his former work.

Conclusions of Law

Claimant has become permanently partially disabled because of the accident. It seems clear to me that he can no longer perform the rigorous work of a Cable Splicer A because of his knee injury. Pursuant to Section 8(c)(21) of the Act, Claimant is entitled to receive compensation based upon the difference between his pre-injury average weekly wages and his post-injury wage earning capacity. The evidence is that although Claimant has been paid as a Class A Cable Splicer A for performing light duty since the accident, he has been denied several salary increases and no longer works overtime because of his disability.

Claimant urges that his 1974 earnings be used to determine his average weekly wages. However, as the Employer correctly points out, Claimant's 1974 earnings were abnormally high because Claimant worked an unusual amount of overtime on subway construction during that year. Thus, it would be unfair to the Employer to utilize only 1974 in determining Claimant's average weekly wage.[1]

The Employer contends that Claimant's 1974 earnings therefore should be disregarded. I disagree. In order to

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[1] The following table shows that Claimant's 1974 earnings as well as those of most other Class A Cable Splicers shown are unusually high compared to the other years.

Employee	1972 Wages	1973 Wages	1974 Wages	1975 Wages
Claimant	$14,655.84	$15,251.53	$21,959.38	$12,086.48
Bond	$15,298.67	$18,388.66	$20,912.28	$17,527.12
Waldron	$13,335.31	$15,557.99	$15,987.57	$17,201.87
Burnside	$13,836.89	$16,275.36	$17,944.41	$16,397.97
Bacigluppi	$13,908.26	$18,630.54	$19,503.16	$18,623.67
Shenk	$13,814.15	$18,256.45	$18,653.51	$17,133.44
McManus	$11,725.60	$12,424.31	$13,430.72	$14,622.39

compensate Claimant for his loss of earnings as a result of the injury, 1974 as well as 1972, 1973 and 1975 earnings must be considered.

At the outset it is evident that because these overtime earnings play such an important role, Section 10(a) and 10(b) of the Act can not be reasonably and fairly applied and Section 10(c) must be utilized.

Several different approaches have been suggested. The one that I find most reasonable and fair is Counsel for Claimant's suggestion that the ratio of overtime to base earnings be average for 1972, 1973 and 1974 and that this average be used to determine Claimant's lost overtime earnings. By use of this method, I find that for 1972, 1973 and 1974 Claimant's average overtime earnings equaled 43.67% of his base earnings.[2]

At Claimant's post-injury rates, it appears that his 1975 straight time earnings would have been $14,263.84 had he worked during the entire year.[3] Claimant was denied base pay increases totalling $.18 per hour because of his injury. On an annual basis, this amounts to $374.40 of lost base pay.

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[2] This computation was made as follows:

YEAR	BASE EARNINGS	OVERTIME EARNINGS	PERCENTAGE-OVERTIME OF BASE
1972	$10,940.80	$3,715.04	33.96
1973	$11,743.60	$3,507.93	29.87
1974	$13,416.00	$8,543.30	63.68
Totals	$36,100.40	$15,766.27	43.67 (Average)

[3] This sum was arrived at based upon a 40 hour week and hourly rates of $6.53 for 22 weeks from January 1 through May 31; $7.09 for 26 weeks from June 1 through November 29; and $7.16 for 4 weeks from November 30 through December 1, 1975. Claimant's actual 1975 earnings were $12,086.48 because he was disabled and received compensation payments from January 1 through March 17, 1975.

By adding $14,263.84 to $374.40 a total of $14,638.24 is obtained which can be used as a base upon which to apply the overtime factor of 43.67%. This results in $6,392.52 of lost overtime earnings which added to the $374.40 of lost base earnings results in a total of $6,766.92. I find this sum to be Claimant's permanently lost earning capacity as a result of the accident. Divided by 52 weeks, this constitutes $130.13 per week. Claimant is entitled to receive weekly compensation of 66⅔% of this amount or $86.76 per week. In making these determinations and evaluations, I have tried to arrive at a fair and equitable assessment of Claimant's reduced earning capacity. I am convinced that the method adopted accomplishes that objective.[4]

I further find that Leslie Scherr, Esquire, is entitled to receive from the Employer a fee of $3,000.00 for legal services rendered to claimant herein and recovery of expenses totalling $279.30, all which I find to be reasonable. The expenses include a witness fee of $250.00 payable to Dr. Collins.

ORDER

1. The Employer, Potomac Electric Power Company, shall pay to Claimant, Terry M. Cross, Jr., $86.76 per week from March 17, 1975 onward, with interest of 6 percent per annum from the date that each payment was due, together with all of Claimant's reasonable medical expenses.

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[4] The future overtime requirements for the subway are unpredictable. Although the Employer alleged that 1974 was vastly disproportionate, it should be noted that the 1975 earnings for the other 6 employees, whose earnings were submitted by the Employer and shown at footnote 1 herein, declined but an average of 4.6% from 1974 to 1975. Had I reduced Claimant's 1974 earnings by this percentage I would have found a loss of earnings of $14[illegible]7 per week. However, I believe that the method utilized results in a more realistic assessment.

2. The Employer shall pay $3,279.30 directly to Leslie Scherr, Esquire, for legal services rendered to Claimant and expenses incurred herein.

/s/ EDWIN S. BERNSTEIN
Edwin S. Bernstein
Administrative Law Judge

Dated: February 28, 1977
Washington, D.C.

Certificate of Filing and Service

I certify that on March 7, 1977 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, District of Columbia District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mr. Terry M. Cross, Jr., 7538 Wilhelm Drive, Lanham, Maryland 20801, Claimant
Potomac Electric Power Company
1900 Pennsylvania Avenue, N.W.
Washington, D.C. 20068
Insurance Carrier or Employer (if self-insured)

Leslie Scherr, Esquire, Margolius, Davis, Finkelstein & Karlin, 1120 Connecticut Avenue, N.W., Washington, D.C. 20036

Richard W. Turner, Esquire, Hamilton and Hamilton, Union Trust Building, Washington, D.C. 20005

A copy was also mailed by regular mail to the following:
Judge Edwin S. Bernstein, Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C. 20210

Associate Solicitor of Labor for Employee Benefits, U.S. Department of Labor, Suite N-2716, NDOL, Washington, D.C. 20210

Director, Office of Workers' Compensation Programs, (LHWCA) U.S. Department of Labor, Washington, D.C. 20211

/s/ JANICE V. BRYANT
Janice V. Bryant
Deputy Commissioner
40th Compensation District
U.S. Department of Labor
EMPLOYMENT STANDARDS ADMINISTRATION
Office of Workers' Compensation Programs

Form LS-19
Rev. Aug. 1975

APPENDIX D

***Williams v. Donovan*, 234 F.Supp. 135 (E.D.La., 1964)**

CHARLES WILLIAMS, *Plaintiff*,

v.

P. J. DONOVAN, Deputy Commissioner Department of Labor, Bureau of Employee's Compensation of the Seventh Compensation District, *Defendant*, and J. P. Florio & Co., Inc., and American Mutual Liability Ins. Co., *Intervenors*.

Civ. A. No. 13679, Division B.

United States District Court
E. D. Louisiana,
New Orleans Division.

Oct. 1, 1964.

Action against deputy commissioner of department of labor bureau of employees' compensation to set aside a compensation order denying plaintiff an award for total and permanent disability. The District Court, Frank B. Ellis, J., held that evidence permitted deputy commissioner to determine that longshoreman who was injured by falling bale or roll of pulp paper which struck his right leg in area of knee, the cap of which was removed in the course of treatment, was partially permanently disabled to extent of 50% loss of use of right leg and that he was not permanently totally disabled and that wage-earning capacity loss in case of scheduled disability was limited to extent to compensation specified in schedule and court and deputy commissioner were precluded from determining award in any other manner.

Judgment accordingly.

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Frank S. Bruno, New Orleans, La., for plaintiff.

Louis C. LaCour, U.S. Atty., and Gene S. Palmisano, Asst. U.S. Atty., New Orleans, La., for defendant.

Edward P. Jerry, of Merritt & Jerry, New Orleans, La., for intervenors.

FRANK B. ELLIS, District Judge.

On December 15, 1958, the plaintiff, Charles Williams, was employed by J. P. Florio & Company as a stevedore assigned to the loading of the S.S. ARNEDYK as it was moored at the Third Street Wharf on the Mississippi River in New Orleans, Louisiana. While performing his duties in the hold of the vessel, plaintiff was injured by a falling bale or roll of pulp paper that struck him on his right leg in the area of the knee. In due course a formal hearing was held under the provisions of the Longshoremen's and Harbor Workers' Compensation Act [1], 33 U.S.C.A. § 901 et seq., and on July 2, 1963, the Honorable P. J. Donovan, Deputy Commissioner of the Department of Labor, issued a compensation order declaring plaintiff to have incurred a "temporary total disability" as well as a "permanent partial disability," and fixing the total compensation award at $15,706.29 less credits for sums previously paid.

Plaintiff instituted the present action against the Deputy Commissioner under Section 21(b) of the Act [2] seeking to have the compensation order set aside, the findings of the Deputy Commissioner reversed, and a judgment entered holding that plaintiff was rendered "totally and permanently disabled". Upon timely application the interventions of the employer, J. P. Florio & Company, and its compensation insurer, American Mutual Liability Insurance Co., were recognized.[3] The case is before the Court now on motions of all parties for summary judgment.

Defendant and intervenors argue that the findings of the Deputy Commissioner, especially the finding as to permanent partial disability, should not be disturbed since they are supported by substantial evidence on the record considered as a whole. Plaintiff disputes this and urges to the contrary that the same record establishes conclusively that in the legal sense he was totally and permanently disabled. The facts not being controverted, this case is ripe for summary adjudication.

[1] Hereinafter referred to as the Act.

[2] 33 U.S.C.A. § 921(b).

[3] Rule 24(a), Federal Rules of Civil Procedure, 28 U.S.C.A.

In O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483 (1951), the Supreme Court succinctly stated the rule to be applied by the courts in reviewing administrative agency findings under the Act:

> "The standard, therefore, is that discussed in Universal Camera Corp. v. [National] Labor [Relations] Board ante, p. 474 [71 S.Ct. 456]. It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole." 340 U.S. at 508, 71 S.Ct. at 472.

This test has been consistently followed by the Fifth Circuit Court of Appeals, Miller v. Donovan, 286 F.2d 422 (1961), and by this Court, Gilbert Pacific Inc. v. Donovan, D.C., 198 F.Supp. 297 (1961).

In making his determination the Deputy Commissioner had the benefit of testimony from plaintiff's treating physician and four orthopedic surgeons, all of whom had examined plaintiff. The initial treating physician was Dr. Dabney M. Ewin, a specialist in the field of general surgery. In March of 1959 Dr. Ewin associated Dr. George D. Berkett, an orthopedic surgeon, for consultation, and in August of 1959 Dr. H. R. Soboloff, another orthopedic surgeon, began treating plaintiff. An exploratory knee operation was performed by Dr. Soboloff on February 23, 1960, at which time the articular surface of the cartilage was removed. Approximately one year later Dr. Soboloff also removed plaintiff's knee cap. Further special examinations of plain-

tiff were performed by Dr. Byron M. Unkauf in November, 1961, and by Dr. Santo J. LoCoco in October, 1962.

At the hearing before the Deputy Commissioner each doctor testified as to plaintiff's disability in the medical sense. Dr. Ewin estimated that there would be a "30 percent disability of the right lower extremity" which would still permit plaintiff to perform the duties of a hook-on man or a fork lift driver, but would preclude his employment in the holds of vessels. Dr. Soboloff also determined that plaintiff had "a 30 percent permanent disability of his leg as a result of the injury and the surgery that was necessitated by it", and enumerated other tasks that he felt plaintiff could perform as a stevedore, such as flagman and winch operator. Dr. Berkett's opinion was to the same effect, finding that the patient's "residual disability was in the neighborhood of 35 percent permanent partial disability of the lower right extremity."

Dr. Unkauf's original estimate of plaintiff's disability was "50 percent of the right lower limb", and he added that further suggested treatment could reduce that figure. However, upon seeing the operative reports of Dr. Soboloff, he set the permanent disability "in the neighborhood of 65 percent". Under similar circumstances Dr. LoCoco first determined the permanent disability to be about 45 percent and then revised it to "about a 60 percent permanent disability, and that's putting it small."

Considering the opinions of these expert witnesses and the other evidence presented at the hearing, the Deputy Commissioner translated disability in the medical sense into disability within the meaning of the Act and made a finding that "the claimant has a permanent partial disability equivalent to 50 percent loss of use of his right leg." After weighing the matter this Court cannot say that the Deputy Commissioner's finding is unsupported by substantial evidence on the record considered as a whole, and consequently affirms that finding, especially since appellate

courts have even upheld findings contrary to the weight of the medical testimony. Todd Shipyards Corp. v. Donovan, 300 F.2d 741, 742 (5 Cir. 1962). See Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 80 S.Ct. 173, 4 L.Ed.2d 142 (1959). In the instant case the finding is clearly in accord with the weight of the medical testimony. Conversely, the Court rejects plaintiff's contention that he is totally and permanently disabled.

Plaintiff further argues that in determining the amount of compensation due and owing the Deputy Commissioner committed error by applying a wrong provision of the Act. In calculating the award incident to 50 percent permanent partial disability of the right leg, one-half the number of weeks allowable for the loss of a leg under Section 8(c) (2) of the Act [4] was multiplied by the weekly rate. This rate is not in dispute.

Instead, it is contended here that the general wage-earning capacity test defined in Section 8(h) of the Act [5] should have been applied rather than the schedule in Section 8(c). The issue presented then is whether compensation should here be calculated according to the schedule of Section 8(c), or under the provisions of the wage-earning capacity test enunciated in Section 8(h). The Court is of the opinion that the schedule controls and hence also affirms the Deputy Commissioner's method of calculation.

Four subdivisions of Section 8 set forth successively the compensation to be awarded for the respective classes of disability, that is, a) permanent total disability, b) temporary total disability, c) permanent partial disability, and e) temporary partial disability. Under subdivision (c) a compensation schedule is provided enumerating various permanent partial disabilities and assigning to each a cer-

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[4] 33 U.S.C.A. § 908(c) (2).

[5] 33 U.S.C.A. § 908(h). See note 6.

tain number of weeks' compensation to be paid for that disability. In addition, a general catch-all paragraph is included to cover those types of permanent partial disabilities not specified in the other paragraphs:

> "(21) Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his *wage-earning capacity* thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest." (emphasis added)

Thus it is evident that when considering compensation in a case of permanent partial disability, the form and language of the Act dictate that the wage-earning capacity test be applied only in those "other cases" not listed in the schedule. Moreover, since the term "wage-earning capacity" is not otherwise defined in the Act, that definition is provided in Section 8(h) merely as a definition and not as an alternative method of calculating scheduled compensation benefits.[6]

[6] The language of the subdivision bears this out:

> "(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c) (21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future."

Plaintiff places reliance upon, and his argument is keyed to, the definition of "disability" in Section 2 of the Act:[7]

> "(10) 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

The contention then is urged that an application of the schedule fails to make allowance for the wage-earning capacity loss of a disabled person. However, it has been held, and this Court fully agrees, that in passing the Act

> "Congress has determined that a loss of wage-earning capacity *and its extent* are conclusively established when one of the enumerated physical impairments is proven to have arisen out of the employment." (emphasis supplied) Travelers Insurance Co. v. Cardillo, 225 F.2d 137, 144 (2 Cir. 1955) cert. den. 350 U.S. 913, 76 S.Ct. 196, 100 L.Ed. 800; Bethlehem Steel Corp. v. Cardillo, 229 F.2d 735 (2 Cir. 1956).

This indicates a legislative determination that the wage-earning capacity loss in the case of a scheduled disability shall be limited in extent to the compensation specified in the schedule, precluding this Court and the Deputy Commissioner from determining an award in any other manner. Furthermore, the only cases cited or known by the Court[8] involving an application of the wage-earning capacity test resulted from non-scheduled injuries falling within Section 8(c)(21).[9] Consequently, the motions of defendant and in-

[7] 33 U.S.C.A. § 902.

[8] See, for example, Alexander v. Meiji Kaiun K. K., 195 F.Supp. 831 E.D. La. 1961), affirmed sub nom. Strachan Shipping Co. v. Alexander, 311 F.2d 385 (5 Cir. 1962) [lumbo sacral strain]; Burley Welding Work v. Lawson, 141 F.2d 964 (5 Cir. 1944) [back injury]; Travelers Insurance Co. v. McLellan, 288 F.2d 250 (2 Cir. 1961) [back injury]; Lumber Mutual Casualty & Ins.

tervenors for summary judgment are granted, and plaintiff's motion for summary judgment denied.

Lastly, the attorney for claimant, Frank S. Bruno, was allowed a fee of $300.00 for legal services in connection with prosecution of the claim before the Deputy Commissioner. He has included a prayer here for reasonable attorney fees commensurate with the services reasonably rendered, on grounds that the fee set was not in accordance with law and the evidence in the case. Nowhere does the record indicate that the attorney submitted an application to the Deputy Commissioner supported by a sufficient statement of the extent and character of the necessary work done on behalf of the claimant. This left the Deputy Commissioner clearly within the letter of the pertinent regulation to approve a fee

> "reasonably commensurate with the actual necessary work performed by such representative, taking into account the capacity in which the representative has appeared, the amount of compensation involved, and the circumstances of the claimant." 20 C.F.R. § 31.21.

Not so clear is whether on the facts present in this case the fee is reasonable and in accordance with the test specified in the regulation.

Mr. Bruno has represented claimant as his sole attorney from October 17, 1961, to the present. He prepared for and conducted two days of hearings before the Deputy Commissioner, examining seven witnesses, five of whom were medical experts. Through this attorney's efforts a compensation award exceeding $15,000.00 was secured, and this appeal, albeit unsuccessful, was prosecuted. As to claimant's circumstances, the records of J. P. Florio & Company indicate that plaintiff has been recently earning as much as $400.00 per month. This Court holds that under the test specified in the regulation, in light of the circumstances indicated above, and in accordance with Section 28(a) of the Act[9], the attorney is awarded an additional fee of Five Hundred Dollars ($500.00) for his services.[10]

Co. v. O'Keefe, 217 F.2d 720 (2 Cir. 1954) [back injury]; Twin Harbor Stevedoring & Tug Co. v. Marshall, 130 F.2d 513 (9 Cir. 1939) [neck injury]; and Flores v. Bay Ridge Operating Co., Inc., 131 F.2d 310 (2 Cir. 1942) [back injury].

[9] 33 U.S.C.A. § 928(a).

[10] Radcliff Gravel Co. Inc. v. Henderson, 138 F.2d 549 (5 Cir. 1943); Fidelity & Casualty Co. of New York v. Henderson, 128 F.2d 1019 (5 Cir. 1912).

APPENDIX E

***Williams v. Donovan*, 367 F.2d 825 (5th Cir., 1966)**

CHARLES WILLIAMS, *Appellant*,

v.

P. J. DONOVAN, Deputy Commissioner, Department of Labor, Bureau of Employee's Compensation of the Seventh Compensation District et al., *Appellees*.

No. 22224.

United States Court of Appeals
Fifth Circuit.

Nov. 2, 1966.

Action against deputy commissioner of department of labor, bureau of employee's compensation, to set aside a compensation order denying longshoreman an award for total and permanent disability. The United States District Court for the Eastern District of Louisiana, Frank B. Ellis, J., 234 F.Supp. 135, granted the deputy commissioner's motion for summary judgment and denied longshoreman's motion for summary judgment. The longshoreman appealed. The Court of Appeals held that the record sustained the deputy commissioner's order denying compensation.

Affirmed.

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Frank S. Bruno, New Orleans, La., for appellant.

Edward P. Jerry, Frederick W. Veters, Asst. U.S. Atty., New Orleans, La., Louis C. LaCour, U.S. Atty., for appellee Donovan. Charles Donahue, Sol. of Labor, Alfred H. Myers, George M. Lilly, Attys., U.S. Dept. of Labor, of counsel.

Merrit & Jerry, New Orleans, La., for appellees, Florio and American Mutual Liability Ins. Co.

Before JONES and COLEMAN, Circuit Judges, and CHRISTENBERRY, District Judge.

PER CURIAM:

Although counsel for the appellant strongly urges that this is something more than a review of an award by the Deputy Commissioner in a longshoreman's compensation case by the test of whether the award is supported by the record considered as a whole, it is our conclusion that such is the test which must be applied. The district court had the matter before it on a petition for review. It is the view of this Court that the facts as recited by the district court are correctly stated in its decision and that the principles which it has announced are sound. Williams v. Donovan, D.C.E.D. La.1964, 234 F.Supp. 135. It follows that, applying those principles, the award of the Commissioner and the judgment of the district court should be and are

Affirmed.

APPENDIX F

***Flamm v. Hughes*, 329 F.2d 378 (2nd Cir., 1964)**

MARGARET DONOHUE MULLIN FLAMM, as Executrix of the Last Will and Testament of Charles Flamm, deceased, *Plaintiff-Appellant,*

v.

THOMAS F. HUGHES, Deputy Commissioner, Second Compensation District and Bethlehem Steel Company, Inc., *Defendants-Appellees.*

No. 299, Docket 28297.

United States Court of Appeals
Second Circuit.

Argued Feb. 11, 1964.

Decided March 20, 1964.

Proceeding on application for convocation of a three-judge court to consider claimed unconstitutionality of federal statute. The United States District Court for the Eastern District of New York, Jacob Mishler, J., entered a judgment denying the application and dismissing the complaint, and the plaintiff appealed. The Court of Appeals, Lumbard, Chief Judge, held that claim that section of Longshoremen's and Harbor Workers' Compensation Act providing schedule of compensation for specified injuries is unconstitutional in that it fails to provide compensation in accordance with schedule for permanent partial disability resulting from combination of injuries not explicitly enumerated failed to raise a substantial federal question necessary to convene three-judge court.

Affirmed.

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Dora Aberlin, New York City, for plaintiff-appellant.

Edward Berlin, Department of Justice, Washington, D.C. (John W. Douglas, Asst. Atty. Gen., Sherman L. Cohn,

Dept. of Justice, Washington, D.C., and Joseph P. Hoey, U.S. Atty. for Eastern Dist. of New York, Brooklyin, N.Y., on the brief), for defendant-appellee Thomas F. Hughes.

Leonard J. Linden, New York City (Theodore H. Goding, New York City, on the brief), for defendant-appellee Bethlehem Steel Co., Inc.

Before LOMBARD, Chief Judge, and WATERMAN and FRIENDLY, Circuit Judges.

LUMBARD, Chief Judge:

On March 30, 1950, while in the employ of the Bethlehem Steel Company, Charles Flamm sustained personal injuries when a ladder which he was descending gave way. On July 20, 1951, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., Deputy Commissioner Willard found that, from March 31, 1950 to January 30, 1951, Flamm had suffered a temporary total disability, as the result of a back injury, and a 30% permanent partial disability of the left foot.

In two suits brought in the Eastern District of New York, Flamm sought unsuccessfully to challenge the determination of the Deputy Commissioner. A third suit in the Eastern District was stayed in 1960 pending further proceedings before Deputy Commissioner Hughes. On October 6, 1961, following further hearings, Deputy Commissioner Hughes modified the 1951 compensation award to provide temporary total disability from March 31, 1950 to January 31, 1952, and permanent partial disability from February 1, 1952 to April 22, 1961. Meanwhile Flamm had died on April 23, 1961. The 1951 award of permanent partial disability, predicated upon partial loss of one leg, was limited under 33 U.S.C. § 908(c) to a prescribed number of weeks. The 1961 award of permanent partial disability, however, predicated upon a combination of infirmities not specifically enumerated in § 908(c), was limited to the remainder of Flamm's life.[1]

Upon payment of the 1961 compensation award, the district court action was dismissed. In March, 1962 Mrs. Flamm, as executrix of her husband's estate, requested the Deputy Commissioner to reconsider his decision. When that request was not acted upon, she instituted this action in the Eastern District, charging that § 908 of the Compensation Act is "discriminatory, void and unconstitutional in that it denies to injured workmen the equal protection of the laws

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[1] Secton 908(c) provides, in pertinent part:

"Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

"(1) Arm lost, three hundred and twelve weeks' compensation.

"(2) Leg lost, two hundred and eighty-eight weeks' compensation.

"(3) Hand lost, two hundred and forty-four weeks compensation.

"(4) Foot lost, two hundred and five weeks' compensation.

• • •

"(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

• • •

"(21) Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest."

and discriminates unfairly against more seriously injured workmen," and requesting the convocation of a three-judge court to enjoin enforcement of that provision. 28 U.S.C. §§ 2282, 2284. Judge Mishler denied that application and dismissed the complaint and from that action Mrs. Flamm appeals.

The plaintiff's claim in essence is that § 908(c) erects unconstitutional distinctions among various types of injuries in that it provides a specific schedule of compensation for a limited number of weeks for those injuries resulting in permanent partial disability which are explicitly enumerated in that provision but fails to provide for compensation in accordance with such schedules for permanent partial disability resulting from a combination of injuries not explicitly enumerated. The primary issue here presented is whether this claim raises a substantial federal question; "[t]he lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this [Supreme] Court as to foreclose the subject." California Water Service Co. v. City of Redding, 304 U.S. 252, 58 S.Ct. 865, 82 L.Ed. 1323 (1938). As the claim is obviously without merit, as manifested by a decision of the Supreme Court, we hold that the plaintiff's claim fails to raise a substantial federal question.

Congress enjoys great latitude in promulgating a statutory scheme for the compensation of workers who may suffer a broad range of injuries in terms of duration and severity. That one may receive greater compensation in certain circumstances for temporary disability than for permanent disability does not lead to the conclusion that the statutory scheme is irrational, for one may not equate the duration of an injury with its severity. Nor is it irrational for Congress to provide a specific schedule of compensation limited to a prescribed number of weeks for enumerated permanent partial disabilities and yet provide compensation for an indefinite period of time for all other injuries leading to permanent partial disability. Thus it is of no constitutional significance that Mr. Flamm's compensation award, cut short by his death, would have been greater if the injuries leading to his disability had been among those enumerated in § 908(c).

In holding the Compensation Act to be constitutional in Crowell v. Benson, 285 U.S. 22, 41, 52 S.Ct. 285, 288, 76 L.Ed 598 (1932), the Supreme Court stated "But it cannot be said that either the classifications of the statute or the extent of the compensation provided are unreasonable." It is thus clear that the plaintiff's claim fails to raise a substantial federal question, and the district court quite properly denied the application on convocation of a three-judge court and dismissed the complaint.

There is equally little merit in the appellant's contention that the district court should have remanded the case to Deputy Commissioner Hughes for action on her application for reconsideration of the 1961 compensation award. The Compensation Act provides that the deputy commissioner's order shall be final unless proceedings for the setting aside of the order are instituted within 30 days of its filing. 33 U.S.C. § 921. Mrs. Flamm instituted no such action. The provision of the Act, 33 U.S.C. § 922, which permits any party in interest to apply for modification of a compensation award "on the ground of a change of conditions or because of a mistake in a determination of fact" was inapplicable inasmuch as Mrs. Flamm at no time disputed the findings of fact of Deputy Commissioner Hughes. Thus there were ample grounds for the dismissal of the complaint by the district court.

The judgment of the district court is affirmed.

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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

No. 79-816

POTOMAC ELECTRIC POWER COMPANY,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, United States Department of Labor

and

TERRY M. CROSS, JR.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF IN OPPOSITION

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Pet. App. A) is not yet reported. The decision of the Benefits Review Board of the Department of Labor (Pet. App. B) is reported at

7 BRBS 10. The Opinion and Order of the Administrative Law Judge of the Office of Workers' Compensation (Pet. App. C) is not reported.

JURISDICTION

The judgment of the Court of Appeals was entered on August 24, 1979. No petition for rehearing was filed with that court. The petition for a writ of certiorari was filed with this court on November 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

QUESTION PRESENTED

Whether an employee covered by the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. § 901, *et seq.*, who suffers a loss in wage earning capacity as defined in the Act as a result of an injury to his knee, is entitled to compensation pursuant to 33 U.S.C. § 908 (c)(21), based upon that loss of wage earning capacity.

STATUTE INVOLVED

The statutory provision involved is the Federal Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. § 901, *et seq.* The relevant statutory provisions are set forth in Petitioner's Statutory Appendix at 1a-4a.

STATEMENT

Respondent Terry M. Cross ("Cross") is and was a Class A cable splicer for Petitioner, Potomac Electric Power Company, ("PEPCO"). In an accidental injury arising out of and in the course of his employment, Cross injured his left knee, resulting in a tear of the medial miniscus (fibrocartilage) of that knee and necessitating the surgical removal of the medial miniscus.

After the surgery, Cross was able to return to light duty status but, because of the continuing pain, discomfort, swelling and buckling in his knee, was unable to perform the rugged duties of a Class A cable splicer. His light duty status was imposed by the Medical Director of PEPCO. He accordingly has been denied both in grade wage raises and overtime work.

The Administrative Law Judge of the Office of Workers' Compensation found that Cross was permanently partially disabled, that he suffered a loss in wage earning capacity, and that he was entitled to compensation under 33 U.S.C. § 908(c)(21). That decision was affirmed by both the Benefits Review Board and the Court of Appeals.

ARGUMENT

I.
THERE IS NO CONFLICT AMONG THE CIRCUITS

The Court of Appeals below held that where an employee sustains an injury to an anatomical member listed in the scheduled loss provisions of 33 U.S.C. § 908 (c)(1)-(20) which results in an identifiable loss of wage earning capacity, he is entitled to receive workmen's compensation benefits under the provisions of 33 U.S.C. § 908(c)(21). That decision is in complete accord with the decisions of the Benefits Review Board which has considered that issue, *Mann v. Old Dominion Steering Corp.*, 1 BRBS 357 (1975); *Longo v. Universal Terminal & Stevedoring Corp.*, 2 BRBS 357 (1975), and with the rationale behind the opinions of *American Mutual Insurance Co. of Boston v. Jones* 138 U.S. App. D.C. 269, 426 F.2d 1263 (1970) and *Jacksonville Shipyards, Inc., v. Dugger*, 587 F.2d 197 (5th Cir. 1979).

Petitioner relies on *Williams v. Donovan*, 234 F.Supp. 135 (E.D.La. 1964), affirmed *per curiam* 367 F.2d 825

(5th Cir. 1966), *cert. denied* 386 U.S. 977. The Fifth Circuit opinion affirming the District Court did not address the issue of exclusivity and it is unclear from the short opinion whether that issue was even before the Court of Appeals. The focus of the Court's affirmance is on the issue of total as opposed to partial disability. In any the case, the Fifth Circuits' adoption of the *American Mutual Insurance Company of Boston v. Jones, supra*, rationale, casts considerable doubt as to the continued viability of the District Court's opinion in *Williams* on the issue of exclusivity even in the Fifth Circuit. It is clear that for the last ten years, every decision on the issue of exclusivity has been in accord with the opinion below and has rejected or distinguished the district court's opinion in *Williams*. It is unnecessary for this Court to go further.

II.

THIS IS NOT AN ISSUE SUFFICIENTLY IMPORTANT TO WARRANT THIS COURT'S CONSIDERATION

The Petitioner places great significance on the fact that this Act has never been interpreted by a Court in this manner. The flaw in that argument is that in the entire history of the Act, this issue has apparently only arisen in two cases, the instant case and in *Williams, supra*. Furthermore, this exact issue has apparently been addressed by the Benefits Review Board only three times: the instant case, *Longo v. Universal Terminal & Stevedoring Corp., supra*, and *Mann v. Old Dominion Steering Corp., supra*. Not only has this provision been interpreted consistently for over the last ten years, but it is also an issue which appears to be of little widespread relevance and of limited frequency. There is no need for this Court's consideration for an issue both well settled and rare.

III.

THE OPINION BELOW IS CONSISTENT WITH THE STATUTE

As pointed out in the majority opinion, the holding below is consistent with both the intent of Congress and the clear distinction the statute has drawn between a physical injury and an economic disability. Pet. App. A at 9a-11a. Petitioner cites a proposed amendment to 33 U.S.C. § 908(c) which would have given an employee both the benefits under the scheduled loss provision, based on total compensation, and then a continuing benefit under section 908(c)(21), based on loss of wage earning capacity. Petition for Writ of Certiorari n.4 at 7 and accompanying text. Petitioner asserts that this amendment would have codified the result below in this case but was not reported out of Committee and thus was rejected by Congress. However, the opinion below recognizes that the scheduled loss provisions create a benefit floor based on income, but that an employee who suffered a loss of earning capacity would recover for that lost earning capacity. The employee can receive benefits based on one or the other formula, but not both. The proposed amendment would have allowed the employee to receive both benefits successively. It is that provision which Congress rejected, not the result below.

CONCLUSION

On the basis of the foregoing, Respondent Terry M. Cross, Jr., respectfully suggests that the writ of certiorari should not be granted.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-816

POTOMAC ELECTRIC POWER COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 5a-40a) is reported at 606 F. 2d 1324. The opinion of the Benefits Review Board (Pet. App. 41a-44a) is reported at 7 B.R.B.S. 10. The Decision and Order of the administrative law judge (Pet. App. 45a-51a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1979. The petition for a writ of certiorari was filed on November 23, 1979. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether, in the circumstances of this case, the court of appeals correctly affirmed an award of compensation benefits for an injured knee under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, where the compensation was calculated under the Act's "other cases" provision, 33 U.S.C. 908(c)(21), rather than its schedule provisions for partial loss of use of a leg, 33 U.S.C. 908(c)(2) and (19).

STATEMENT

Respondent Terry M. Cross, Jr. ("claimant") has been employed by petitioner Potomac Electric Power Company continually since 1961. From 1972 until he was injured in 1974 he worked as a Class A cable splicer (Pet. App. 46a). That job is physically demanding, requiring the worker to lift heavy equipment and climb up and down ladders and scaffolding. Only an agile worker in good physical condition can perform the necessary climbing and twisting involved in working on cables in confined areas (*ibid.*).

On December 7, 1974, claimant injured his left knee while working in a manhole (Pet. App. 46a). He filed a claim for benefits under the District of Columbia Workmen's Compensation Act (D.C. Code § 36-501 (1973)), an extension of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.* Petitioner and claimant disagreed on the method of computing compensation for permanent partial disability under Section 8(c) of the Act, 33 U.S.C. 908(c), so the matter was referred to the Office of Administrative Law Judges for a formal hearing.

At the hearing, evidence was introduced to show that claimant sustained a 5% to 20% permanent partial disability of his leg (Pet. App. 46a-47a). The administrative law judge found that, although claimant was still paid as a Class A cable splicer after surgery on his knee, he could no longer fully perform all the rigorous work that job entailed and that, as a result of this disability, claimant was denied several salary increases and no longer worked overtime. Using claimant's past earnings as a guide, the administrative law judge computed claimant's compensation rate under the "other cases" provision of Section 8(c)(21) of the Act, 33 U.S.C. 908(c)(21), rather than under the schedule provisions for partial loss of use of a leg, Section 8(c)(2) and (19) of the Act, 33 U.S.C. 908(c)(2) and (19). Under the schedule provisions, claimant would have been entitled to receive a fixed sum equalling a certain percentage of his average weekly wages for a specified number of weeks. The award made under the "other cases" provision took the form of weekly compensation based on the difference between claimant's pre-injury wages and his post-injury wage-earning capacity, without limitation as to the number of weeks.

Petitioner appealed, contending that claimant was limited to a scheduled award under Section 8(c)(2) and (19). The Benefits Review Board affirmed the administrative law judge's decision (Pet. App. 41a-44a), holding that the schedule benefits are not exclusive and that where a claimant can prove a loss in wage-earning capacity greater than the compensation provided by the schedule, he may pursue a claim under Section 8(c)(21). The court of appeals affirmed the Board's decision by a divided vote (Pet. App. 5a-40a).

ARGUMENT

1. Petitioner's primary contention (Pet. 4-5) is that the court of appeals' decision directly conflicts with *Flamm* v. *Hughes*, 329 F. 2d 378 (2d Cir. 1964) (Pet. App. 65a-69a), and *Williams* v. *Donovan*, 234 F. Supp. 135 (E.D. La. 1964), aff'd per curiam, 367 F. 2d 825 (5th Cir. 1966), cert. denied, 386 U.S. 977 (1967) (Pet. App. 53a-64a). In *Flamm*, however, the issue presented to the Second Circuit was whether the Act is unconstitutional because it establishes a schedule of specified benefits only for certain enumerated injuries, with the result that claimants whose injuries do not come within the schedule may in some instances receive less compensation than claimants with less severe disabilities whose injuries are within the schedule.[1] The proposition that the schedule allowances and the "other cases" provision constitute mutually exclusive benefit schemes was not in contention between the parties and was, at most, as the dissenting judge below speculated (Pet. App. 32a), an "unarticulated predicate for Judge Lumbard's opinion for the Second Circuit." But an "unarticulated" assumption that

[1]The claimant in *Flamm* was the widow of a workman whose award under the "other cases" provision was equal to a percentage of his weekly wages for the remainder of his life, as long as the disability remained; the workman's death during the administrative proceedings had resulted in an award smaller than many of the schedule allowances for specific injuries (Pet. App. 69a). The Second Circuit held only that it was not irrational for Congress to compensate enumerated injuries in a manner different from that used "for all other injuries" (*id.* at 68a-69a). That holding is not inconsistent with the view that in some circumstances a person suffering from one of the enumerated injuries might alternatively recover compensation under the "other cases" provision. The claimant in *Flamm* apparently never contended that she was entitled to recover under a specific clause of the statute in lieu of the "other cases" provision.

is unnecessary to the result is hardly a conflict, analysis of an issue, and *Flamm* therefore is not in conflict with the decision below.[2]

Williams v. *Donovan*, *supra*, in which the Fifth Circuit affirmed a district court decision holding that a claimant suffering a permanent partial disability of the knee must receive benefits under the schedule provision rather than the "other cases" provision of the Act, does conflict with the decision in the present case, but it does not represent a recent or reasoned consideration of the issue. The Fifth Circuit's one-paragraph per curiam opinion does not discuss the exclusivity issue, and the district court decision it affirmed was, like the Second Circuit's decision in *Flamm*, written more than 15 years ago.

During those 15 years, as the court below pointed out (Pet. App. 13a), a great many states have abandoned the *Williams* rationale in interpreting state workmen's compensation schemes similar to the Act. Moreover, the Benefits Review Board, which in 1972 replaced the district courts as the initial review tribunal under the Act, has expressly rejected *Williams* in a number of cases involving permanent total disability. See, *e.g.*, *Brandt* v. *Avondale Shipyards, Inc.*, 8 B.R.B.S. 698, BRB No. 77-103 (1978); *Dugger* v. *Jacksonville Shipyards*, 8 B.R.B.S. 552, BRB No. 77-692 (1978), aff'd, 587 F. 2d 197 (5th Cir. 1979) (distinguishing *Williams*).

[2]Indeed, the court of appeals' opinion in *Flamm* is even less apposite to the present case than the discussion in the text suggests. The precise question before the Second Circuit was whether the district court should have sought the convening of a three-judge court to consider the claimant's constitutional challenge to the statute (Pet. App. 68a).

We submit that there is no need for the Court to consider this issue at this time. The issue does not arise in litigation with any frequency, as the paucity of appellate decisions indicates. Furthermore, it is possible that the Fifth Circuit would decline to adhere to its view in *Williams* in light of the intervening decisions of the Benefits Review Board and the District of Columbia Circuit. Petitioner's assertion (Pet. 6) that the opinion below "will undoubtedly burden the administrative bodies and the Courts with much additional litigation" is unsupported speculation, based simply on an assumption that many workers suffering partial impairments will conclude that they can obtain greater benefits by seeking to prove actual earning disability rather than by recovering under the schedule without the necessity of such proof. If that assertion were to prove correct, there will be time enough for this Court to resolve any conflicts that may continue to exist.

2. Contrary to petitioner's contention (Pet. 6), the decision of the court of appeals is in accordance with the law. "Disability" is defined in Section 2(10) of the Act, 33 U.S.C. 902(10), as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." Disability is, therefore, an economic as well as a medical concept within the meaning of the Act. *Quick* v. *Martin*, 397 F. 2d 644, 648 (D.C. Cir. 1968).

The schedule allowances in Section 8(c) (1)-(20) of the Act, 33 U.S.C. 908(c)(1)-(20), do not compensate injured employees for "disability." Although Section 8(c) is entitled "Permanent partial disability," the schedule included in the section provides compensation for *impairment*, whether or not it is accompanied by *disability* (loss of wage-earning capacity). It establishes an irreducible minimum number of weeks of compensation for certain serious injuries, whether or not the injuries affect the employee's ability to earn a living.[1] As the court of appeals properly noted (Pet. 11a; emphasis added), "if the injury also renders [an employee's] entire body, as a functioning economic unit, permanently partially *disabled*," he is entitled to compensation for loss of wage-earning capacity under Section 8(c)(21) of the Act, 33 U.S.C. 908(c)(21). The injured employee has then sustained more than just an impairment listed in the schedule, so the injury properly falls within the "other cases" provision.

The District of Columbia Circuit is not alone in its holding that schedules are not intended to limit compensation when a specified injury affects a covered worker in a way that produces a loss of wage-earning capacity that exceeds the schedule allowance. As Professor Larson notes, a number of state courts have recognized the error of the old rule that the schedule allowance is exclusive. 2 A. Larson, *The Law of Workmen's Compensation* § 58.20 (1974). Thus, as one state court has noted (*American Tank and Steel Corp.* v.

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[1] In considering the purpose of schedule allowances in Michigan's workers' compensation statute, the Supreme Court of Michigan concluded:

> [The intent was] to consult broad industrial experience and lay down an irreducible minimum number of weeks allowable for certain common specific losses thus removing the issue from costly and delaying litigation at a time when the workman was most helpless and his need the greatest leaving the question of further disability and compensation to be determined on proofs made at a hearing * * *, having due regard for the nature and extent of the injuries, the then capacities and general condition of the workman, and the kind of job he had before his injury[.]

Van Dorpel v. *Haven-Busch Co.*, 350 Mich. 135, 144, 85 N.W.2d 97, 102 (1957).

Thompson, 90 N.M. 513, 515, 565 P.2d 1030, 1032 (1977)): "If one suffers a scheduled injury which causes a physical impairment but does not create disability, [the schedule] will apply. When the impairment amounts to disability, [the general provisions for total or partial disability] are properly invoked." See also *Republic Steel Corp.* v. *Kimbrell*, 370 So.2d 294 (Ala. Civ. App.), writ denied, 370 So.2d 297 (1979). In the present case, the court of appeals joined these courts in refusing to apply the exclusivity doctrine, which even the dissenting opinion below acknowledges produces questionable results (Pet. App. 16a).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-816

POTOMAC ELECTRIC POWER COMPANY, *Petitioner*,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR,

AND

TERRY M. CROSS, JR., *Respondents*.

BRIEF OF PETITIONER, POTOMAC ELECTRIC POWER COMPANY, ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

REFERENCE TO OPINIONS DELIVERED IN THE COURTS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit (Appendix A) is reported at —— U.S.App.D.C. ——, 606 F.2d 1324 (1979). The decision of the Benefits Review Board of the Department of Labor (Appendix B) is reported at 7 BRBS 10. The Decision and Order of the Administrative Law Judge of the Office of Workers' Compensation (Appendix C) is not reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered on August 24, 1979. No petition for re-hearing was filed in that Court. Jurisdiction of this Court was invoked under 28 U.S.C. § 1254(1). The Petition for a Writ of Certiorari was granted by this Court on February 19, 1980.

QUESTIONS PRESENTED FOR REVIEW

Whether the divided opinion below was correct in requiring an employer subject to the Longshoremen's and Harbor Workers' Act, which had paid in full all compensation due to an injured employee for permanent partial disability during the period specified for a loss scheduled under Section 8 (c)(2), (19), to pay additional compensation beyond such specified period by reason of Section 8 (c) (21), in view of:

(1) The clear language of the Act in which a line of demarcation is drawn between compensation under a specific formula for a specified period for disabilities to enumerated parts of the body, and Section 8 (c) (21)'s "all other cases of this class of disability" provision, whereunder compensation is awarded on another basis, *i.e.*, the resulting impairment of earning capacity in the individual case;

(2) The legislative history underlying the Act, which shows that the Congress, both at the time of the original enactment and again at the time of the extensive 1972 amendments to the Act, made a conscious decision to restrict compensation for scheduled disabilities to the periods specified, and not on the basis of an individual's impaired earning capacity; and

(3) The prior uniform interpretation of the 53-year old Act by the federal courts as to the conclusively established periods of disability for scheduled losses, which are not dependent on any determination as to an individual's wage earning capacity being impaired.

STATUTORY PROVISIONS

The following statutory provisions are set forth in the Appendix of this Brief: Longshoremen's and Harbor Workers' Act, 33 U.S.C. § 908(a) through 908(c)(21); 33 U.S.C. § 908(h) [Statutory Appendix 1a-3a]; D.C. Code § 36-501 [Statutory Appendix 4a].

STATEMENT OF THE CASE

Terry M. Cross, a Class-A cable splicer for the Potomac Electric Power Company, a self-insured employer subject to the Federal Longshoremen's and Harbor Workers' Act[1] (hereinafter "the Act") sustained an on-the-job injury to his knee which required surgery for the removal of the medial meniscus (one of the cartilages of the knee joint). Upon his return to work he said he was able to carry out some, but not all, of the duties of his job, and therefore, was continued as a Class-A cable splicer at the straight hourly rate for that classification, doing lighter work which did not involve climbing. He was later denied ingrade raises and was not allowed to work overtime because of his inability to perform all job requirements.

Medical testimony from two doctors revealed that Mr. Cross sustained a permanent partial disability of

[1] Act of March 4, 1927, C.509, 44 Stat. 1424, as amended. Codified as 33 U.S.C. § 901, *et seq.*

the leg rated between 5 and 20%. There was no evidence such disability extended to any other part of his body.

The employer did not dispute compensability, but contended that since the injury was confined to a particular part of the body (*i.e.*, a partial loss of use of the leg) covered by specific schedule provisions (Section 8[c][2], [19]), compensation should have been calculated on the basis of the conclusively established period specified in such schedule, "(2) Leg lost, two hundred and eight-eight weeks' compensation."

The case was tried before an Administrative Law Judge who found as a fact that because of the loss of wage raises given to others in the same classification and the loss of overtime work, Mr. Cross had sustained a loss of earning capacity beyond that specified in the schedule, and so awarded compensation under Section 8(c)(21), notwithstanding that such approach is limited by its terms to "other cases in this class of disability", *i.e.*, parts of the body not enumerated in the preceeding schedules of loss.

The decision of the Administrative Law Judge was affirmed by the Benefits Review Board (Appendix B). On petition for review pursuant to 33 U.S.C. § 921(c), a divided panel of the United States Court of Appeals for the District of Columbia Circuit affirmed the Board's decision (Appendix A). This Court granted the employer's Petition for Writ of Certiorari to that Court.

SUMMARY OF ARGUMENT

The decision below constitutes a departure from the explicit provisions of Section 8(c) of the Act governing the amounts and periods of compensation specifically applicable to a permanent partial disability to a particular part of the injured workman's body. The decision below obliterates the line of demarcation established by Section 8(c)'s dichotomy between permanent partial disability to parts of the body specified in the schedules of 8(c)(1)-(20), and 8(c)(21)'s provisions governing "other cases in this class of disability", such as unscheduled back injuries, hernias, etc., and is contrary to the uniform 52-year interpretation of the Statute by the federal Courts, the interpretation of the parent New York Act, as well as to the manifest intent of Congress, when it refused to adopt in the original Act or as a part of the sweeping 1972 Amendments, provisions of which would have expanded the benefits obtainable under a scheduled loss by calculating the same on the basis of the individual's impaired earning capacity.

ARGUMENT

I

THE DECISION BELOW IS CONTRARY TO THE EXPRESS PROVISIONS OF THE ACT

Once having adjudicated Mr. Cross as having sustained a "permanent partial disability" to his leg, the implications thereof under the Act became certain under the schedule provisions of Section 8 of the Act, which provide in pertinent part:

> "Compensation for disability shall be paid to the employee as follows:
>
> * * *

(c) Permanent pa ial disability: In case of disability partial in c aracter, but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability . . . and shall be paid to the employee as follows:

* * *

(2) leg lost, two hundred eighty-eight weeks compensation.

* * *

(19) Partial loss or partial loss of use: compensation for partial loss or loss of use of a member may be for proportionate loss or loss of use of a member."

The term "disability" is defined in Section 2(10) of the Act as follows:

"'Disability' means incapacity because of an injury to earn the wages which the employee was receiving at the time of the injury in the same or any other employment."

Section 10 of the Act provides that except when otherwise provided, the average weekly wage of the injured employee at the time of the injury shall be taken as the basis upon which to compute compensation, and sets forth various methods for computing the same.

"Wages" are defined by Section 2(13) as meaning "the money rate at which the service rendered is recompensed under the contract of hiring in force at the time of injury . . .".

Under Section 8(c), which deals with permanent partial disability, a number of "schedules" are set

forth which provide a specific number of weeks' compensation to be paid for losses, partial losses, or partial loss of use of specific parts of the body, as well as for disfigurement in certain cases.

Following these specific loss schedules is Section 8(c)(21), which provides:

"Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the Deputy Commissioner on his own motion or upon application of any party in interest."

Thus, in a case such as the one at bar, where Plaintiff sustained a knee injury which required a surgical excision of the medial meniscus, and which is not found to either have totally disabled the employee or to have affected any other part of his body, Section 8(c)(2) and (19) specifies the payments for the partial loss of use of a leg, utilizing the formula involving a percentage of the specified number of weeks and the employee's average weekly wages at the time of the injury.

Under the specifically scheduled portions of the body [2] in 8(c)(2), (19), the workman receives compen-

[2] Since the enactment of the basic Act in 1927, the scheduled losses have been amended by the Congress so as to increase the number of weeks' compensation for most of the specific parts of the body enumerated in the schedules. As to the schedule contained in 8(c)(2) dealing with the leg, the increase was from 248 to 288 weeks' compensation. See Act of July 26, 1956, C. 735 § 2, 70 Stat. 655.

sation for his "disability" irrespective of whether he actually returns to his work, and irrespective of whether in fact the injury lessens his ability to do his regular job. Thus, even where there was a loss under one of the schedules, but no loss of time from work, the case of *Traveler's Insurance Company* v. *Cardillo,* 225 F.2d 137 (2nd Cir., 1955), cert. denied 350 U.S. 913 (1955) held that the workman was entitled to compensation for the full scheduled benefits, stating:

> ". . . In the case of scheduled losses, the Congress has determined that a loss of wage-earning capacity and its extent are conclusively established when one of the enumerated physical impairments is proven to have arisen out of the employment." [225 F.2d, at 144]

Under the clear import of the statute, and irrespective of whether an employee has in fact lost any time from work, and irrespective of whether or not his earning capacity was actually impaired, the employee with an injury causing permanent partial disability limited to his leg, a portion of the body specifically encompassed by a specific schedule, is entitled to receive two-thirds of his average weekly wages for a period corresponding to the proportion of 288 weeks which his injury bore to the loss of a leg. Using a 20% disability, the largest percentage as found by the Administrative Law Judge in the evidence below (Appendix C, 460), the award would have amounted to $12,773.38,[3] in addition to the wages actually earned by Mr. Cross since his return to work.

[3] By utilizing the three-year period determined by the Administrative Law Judge (App. 48a), Mr. Cross' average weekly wage, including overtime was $332.48. Multiplying this figure under the 8(c)(2)(19) formula, and utilizing the maximum disability of 20% in the evidence (App. 46a), produces the following calculation: $332.48 × 66⅔% × 20% x 288 weeks = $12,773.88.

Contrary to the Act's requirement that Mr. Cross be compensated under the schedule specifically applicable to a leg injury, the Administrative Law Judge undertook to determine that Mr. Cross had sustained an impaired earning capacity, and then awarded benefits under 8(c)(21), despite the fact that by its terms, such section only applies to "other cases". The compensation was calculated upon a formula involving amounts in excess of the employee's average wages, *i.e.,* the difference between average post-injury wages and that which the Administrative Law Judge determined Mr. Cross could have made after the injury and into the future, payable for the length of Mr. Cross' life. The amount payable under the decision below equals $135,346.00,[4] in addition to his wages actually earned after his return to work.

In awarding benefits under Section 8(c)(21) of the Act, the decision below ignored the fact that such section, following the disabilities to specified parts of the body, is limited by the Act so as to be applicable only "In all *other* cases of this class of disability. . ."

The word "other" has a plain and well settled meaning, which is:

> "Different or distinct from that already mentioned, additional or further [citing].
>
> Following an enumeration of particular classes, 'other' must be read as 'other such like' and includes only others of like kind and quantity [cit-

[4] Utilizing a life expectancy of 30 years, multiplied by the $86.76 weekly impairment to wage-earning capacity, as awarded by the Court below.

ing]". *Black's Law Dictionary,* p. 1253 (4th Ed., 1968)

Or, turning to *"Webster's New International Dictionary"*, p. 1598 (3rd Ed., 1968):

> "Being the one (as of two or more) left: not being the one (as of two or more) first mentioned: remaining. . ."

Moreover, the plain meaning of the "all other cases" provision was easily discerned long ago by the New York Court of Appeals in discussing the parallel provisions of the New York Compensation Act, from which the scheduled injury approach was adopted for the federal Act:

> "Obviously, the phrase 'in all other cases' signifies that the provisions of the paragraph shall apply only in cases where the injuries received are not confined to a specific member or specific members." *Sokolowski* v. *Bank of America,* 184 N.E. 492, 494 (N.Y. 1933)

Thus, contrary to the line of demarcation established by the express dichotomy in the statute between disability for specific parts of the body to be computed for a leg under 8(c)(2), (19) and "other cases" under 8(c)(21), the decision below took a "heads I win—tails you lose" approach to the statute. That is, if there are no losses in fact, the employer nevertheless pays compensation under the statutorily established loss of wage earning capacity and its extent—if there is an actual impairment of income earning capacity, the employer pays a larger amount for an indefinite period beyond the specific time periods specified within the schedules.

It is submitted that the decision below is contrary to the express provisions of the Act which specify the precise manner in which a scheduled disability is to be compensated.

II

THE LEGISLATIVE HISTORY SHOWS A CLEAR INTENT TO MAINTAIN THE INTEGRITY OF THE SCHEDULED BENEFITS

If one were to assume *arguendo* that the Act was somehow ambiguous on its face as between the scheduled losses and the "other cases" provision, a review of the legislative history of the Act shows Congress to have purposely adopted the predetermined schedule benefits approach, purposely avoiding the alternate approach of awarding compensation based on the individual's loss of wage earning capacity.

Since that choice was exercised by the Congress both at the time of the Act's adoption in 1927, and again at the time of the sweeping 1972 Amendments to the Act, they will be treated separately below.

A

The Act Prior To 1972

As detailed in the dissent below (Appendix A), the genesis of the Act can be traced to 1926, when S.3170 was introduced in the Senate, and after approval by the Committee, was adopted with no scheduled benefits. See 67 Cong. Rec. 10614 (1926). The Senate revision instead provided that the compensation provisions of the Federal Employees' Compensation Act would govern. S.Rep. No. 973, 69th Cong., 1st Sess. 2-3 (1926); 67 Cong. Rec. 10614 (1926) (remarks of Sen. Walsh). At that time, the Federal Employees Compensation Act provided for compensation on the basis of two-thirds

of the difference between the claimant's pre and post-injury earning capacity. See 5 U.S.C. §§ 754, 756 (1926 ed.) (enacted as Act of September 7, 1916, Pub. L. No. 267, chap. 285, § 4, 39 Stat. 743).

The House spurned such an approach, amending S.3170 to include the "scheduled benefits" approach of the New York Workmen's Compensation Law,[5] the Senate concurring with the House Committee bill as amended. See H.R.Rep. 1767, 69th Cong. 2nd Sess. 4, and § 68 Cong. Rec. 5404, 5414, 5909.

The scheduled benefits Section reflects the Congressional intent to forego the expensive and time consuming case-by-case analysis of the most commonplace industrial injuries[6] and an intention to compensate employees for certain industrial injuries involving loss of a body member irrespective of actual wage-earning capacity impairment. *Gulf Stevedore Corporation* v. *Hollis,* 298 F.Supp. 426 (S.D.Tex., 1969), affirmed 427 F.2d 160 (5th Cir., 1970), cert. denied 400 U.S. 831

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[5] As noted earlier, the New York Act distinguished between scheduled benefits for disabilities to specified parts of the body, and "other cases". New York Workmen's Compensation Law, § 15(3), Para. v (1927). As Congress subsequently did with the Federal Employees' Compensation Act, New York amended its Act in 1970 so as to provide for compensation in addition to the schedule benefits in certain cases. See New York Law, 1970, c.286, effective July 1, 1970.

[6] As noted in the dissent below (Appendix A):

"• • • Second, this effort to avoid case-by-case contention of benefits is consistent with the statute's overall goal of putting an end to the costly and time-consuming actions for damages at common law. This concern and the parallel concern of administrative orderliness that is crucial to understanding the concept of scheduled benefits permeate the sparse record of legislative deliberations. *Sec. e.g.,* H.R.Rep. No. 1767, *supra,* at 19-20; 68 Cong.Rec. 5410 (1927) (remarks of Rep. Graham).

(1970). It was clearly within its legislative discretion for Congress to establish such a statutory scheme. *Flamm* v. *Hughes,* 329 F.2d 378 (2nd Cir., 1964).

Since its passage in 1927, there have been numerous amendments to the specific schedules contained in Section 8(c) of the Longshoremen's and Harbor Workers' Compensation Act. In 1934, the number of weeks for compensation for various scheduled benefits were reduced, but made to run consecutively to temporary total disability benefits. Act of May 26, 1934, c. 354. 48 Stat. 806. In 1948, the permanent disability benefits were made to run in addition to temporary partial disability benefits. Act of June 24, 1948, c.623, 62 Stat. 602. In 1956, the 1934 reduction in the number of weeks of compensation for disability payments for the scheduled losses was repealed, and the benefits under the various schedules were restored to the original levels. Act of July 26, 1956, Pub. L. No. 84-803, c. 735. 70 Stat. 655.

During the period between 1927 and 1972, other related events were transpiring. In 1933, the New York decision in *Sokolowski* v. *Bank of America, supra,* was decided, when the plain meaning of the parent New York statute's "other cases" provision was established. In 1949, and again in 1966, Congress amended the Federal Employees' Compensation Act. The 1949 amendment to that Act provided for scheduled benefits for permanent partial disabilities, but added (for cases of permanent major impairments, such as total loss of use of a member) payment of continued compensation payments beyond the schedule periods as were awarded for nonscheduled injuries. Act of October 14, 1949, c. 691 § 104, 63 Stat. 855. The 1966 amendment expanded this treatment of scheduled injuries to those other than total loss of use of the member (Act

of September 6, 1966, Pub.L. 89-554, 80 Stat. 536), Congress realizing the schedules were conclusive limits on the extent of compensation. See S. Report No. 1285, 89th Cong. 2nd Sess. 3 (1966).

Significantly, it was during this same period that the standard practice of the Deputy Commissioners observing the line of demarcation between the parts of the body contained in the schedules, and the "other cases" provision of 8(c)(21), was first challenged in the Courts, wherein a knee injury was held to be compensible solely under the Section 8(c)(2) schedule, and could not be compensated under 8(c)(21), since it applied only "in those other cases not listed in the schedule". *Williams* v. *Donovan*, 234 F.Supp. 135, 139 (E.D., La., 1964), affirmed 367 F.2d 825 (5th Cir., 1966), cert. denied 386 U.S. 977 (1967).[1]

It is clear that the Act represents a considered choice by the Congress to proceed with the scheduled injury approach whereby a fixed formula is utilized for all cases of the same type injury, and not the case-by-case approach employed either by the Federal Employees' Compensation Act or the 1970 Amendments to the parent New York Act whereby a wage earning impairment must be adjudicated in each individual case.

B

The 1972 Amendments

When the sweeping 1972 Amendments to the Act were considered, the question as to whether the limitations contained in the specific schedules should be enlarged in certain cases was specifically entertained and rejected by the Congress.

[1] *Williams* v. *Donovan* is discussed below, at pages 26-28.

In this regard, there was proposed to both houses of Congress the following amendment to the Act:

> "COMPENSATION AT END OF SCHEDULED AWARD
>
> SEC. 7. Section 8(c) of such Act is further amended by adding the following paragraph:
>
> '(23) With respect to any period after payments under paragraph (c)(1) through (c)(20) have terminated, compensation shall be paid as provided in subsections (a) and (b) of this section if the disability is total, or, if the disability is partial, 66⅔ per centum of the difference between the injured employee's average weekly wages before the injury and his wage-earning capacity after the injury in the same or other employment' ".

This proposal was set forth in Senate Bill No. S.2318 introduced by Senator Harrison Williams, Chairman of the then Senate Committee on Labor and Public Welfare, on July 19, 1971, and referred out to that Committee for hearings. The same proposal was made to the House of Representatives by Representative Dominick Daniels in No. H.R. 12006 on December 2, 1971; by Representative Burton in Bill No. H.R. 15023 on May 17, 1972; and by Representative Meeds in Bill No. H.R. 16562 on September 7, 1972. H.R. 12006 and H.R. 15023 were the subject of hearings before the House Select Committee on Labor of the Committee on Education and Labor.

During introductory remarks to the House, Representative Daniels made the following comment about this portion of the proposed Amendments:

> "Other amendments would also modernize and update the benefit structure of the Act to provide compensation at the end of a scheduled award to

make up the difference in the wages earned by an injured worker after his return to work if he is unable to attain his former wage level." Congressional Record-House, December 2, 1971.

This addition to the scheduled disability benefits prompted extensive discussion and testimony before the Senate Subcommittee on Labor of the Senate Committee on Labor and Public Welfare from supporters and opponents of the measure. *Proposed Amendments to the Longshoremen's and Harbor Workers' Compensation Act*: Hearing on S.2318 *Before the Subcommittee on Labor of the Senate Committee on Labor and Public Welfare*, 92nd Congress, 2nd Session, (May 10, 12, 17, and 24, 1972; June 5, 1972), hereinafter, the Senate Hearings. F. Howard McGuigan, Legislative Representative of the American Federal of Labor and Congress of Industrial Organizations, submitted a prepared statement on the Amendment which included the following on the proposed paragraph (23) of Section 8(c):

"Compensation at End of Schedule Award"

"Section 7 of S.2318 would reinforce one of the basic principles of workmen's compensation. It would provide compensation payments for loss of earning capacity resulting from disability due to any injury, in other words, *for the effect the disability has on the injured worker's ability to earn a living.*

Unfortunately, work injuries can and do result in the loss of fingers, hands, toes, legs, a kidney, or lung. *In these cases, the loss has a greater impact and represents a greater economic earning capacity for some individuals than for others. For example, the loss of a thumb by a carpenter represents a greater loss in earning capacity than a*

similar loss by an accountant. The loss of an arm or leg by a longshoreman might completely eliminate his future earning capacity in the industry. Injuries of this nature very often require individual adjustments to entirely different occupations. (*Senate Hearings*, pp.83-84) [Emphasis added]

Statements further supporting adoption of this addition were provided to the subcommittee by Joseph Koonz, Jr., a District of Columbia attorney specializing in workmen's compensation cases (*Senate Hearings*, p. 164-168) and Thomas W. Gleason, on behalf of the International Longshoremen's Association of the AFL-CIO who pointed out that the extension of permanent partial disability awards where the disability is continuing would "reduce artificial limitation that make compensation less than truly compensatory". (*Senate Hearings*, p.158).

Similar sentiments were expressed on behalf of the Building and Construction Trades Department, AFL-CIO by its President, Frank Bonadio, who pointed out the disparity of benefits between the Longshoremen's Act and the Federal Employees Compensation Act, which, since its 1966 Amendments, had provided federal workers with the very type of permanent partial disabilities to scheduled parts of the body (*Senate Hearings*, p.684).

Among the witnesses opposing passage of this additional section was Ralph Hartman, Assistant Manager, Safety and Workmen's Compensation Division, Industrial Relations Department, Bethlehem Steel Corporation, on behalf of the Shipbuilder's Council of America. Mr. Hartman addressed the proposal in

both his testimony before the subcommittee (*Senate Hearings*, p.172) and in the written text presented:

> "There is a proposal to amend Section 8(c) by providing weekly benefit payments for total or partial disability, as the case may be, following the expiration of the schedule of benefit weeks prescribed in Section 8(c)(1) through 8(c)(20). The "schedule" concept is a carry-over of the common-law damage theory. Under that concept, the worker who, for example, sustains a percentage loss of use of an arm is paid temporary total benefits for time lost and then, under the current provisions, is awarded and paid benefits as prescribed in the schedule. I suggest that the proposed amendment could and possibly would tend to provoke claims of questionable merit for continued payments beginning with the expiration of the schedule award. This is particularly true in the absence of a provision predicating such payments on "wage loss" rather than impairment and/or disability.
>
> *While this amendment is an application of the "wage loss" concept, it has no place in the Act unless that concept is to prevail in all respects.* Section 8(c)(21) of the Act, commonly referred to as the "other cases" provision, provides for benefit payments at two-thirds of the employee's average weekly wage prior to the occurrence, but not in excess of the maximum rate, for disability which does not come within the schedule provisions of the Act (Section 8(c)(1) through 8(c)(20)), but which impairs an employee's earning capacity. *The intent of the proposed amendment is to apply this concept to all schedule award cases after the expiration of any such award. To repeat, we support the wage loss theory and suggest that the schedule provisions reflected in paragraph 8(c)(1) through 8(c)(20) be stricken and wage loss be the only determining factor.* If that is not feasible, although we suggest it is sound and equitable, the average weekly wage factor to be applied should be that of the shipbuilding and ship repair industry, not the longshoring industry." (*Senate Hearings*, p.183-184) [Emphasis added]

The insurance industry, that sector of the economy which initially bears a substantial portion of the cost of compensation benefits expense, was represented at the hearings by Andre Maisonpierre, Vice President, American Mutual Insurance Alliance. Mr. Maisonpierre suggested that permanent partial disability fell into two categories; serious long term disabilities and minor disabilities. He testified that the relatively minor claims were siphoning off the bulk of disability benefits and were, in effect, situations where too many workers were receiving "a little something extra" where there was little or no real permanent disability and no real impairment of the employees' future earning capacity. The net effect, and one which would be compounded under the proposed amendment, was that workers with genuine and serious long term disabilities, were receiving only a small portion of total disability dollars. He testified that the employers' frequently expressed willingness to increase cash benefits to employess with serious disabilities under the scheduled losses section was being prevented by the millions of dollars of cost on the system for injuries which caused no disability. To increase benefits levels without simultaneous reforms to stop this enormous drain would only compound this problem and increase costs. The suggested solution was to eliminate scheduled awards for minor disabilities where there was no actual wage loss. The dollars saved could be used to increase the disability payments under scheduled awards for "major permanent partial disabilities". *Senate Hearings*, p.221-241.

The cost factor was also emphasized by Edward D. Vickery, a Houston attorney on behalf of the National Maritime Compensation Committee. Combined with the proposed removal of the monetary limitation of $24,000 for disability payments, the inclusion of paragraph (23) would create enormous cost consequences. It was suggested by Mr. Vickery to the Senate Subcommittee that the Deputy Commissioners would make awards for loss of wage earning capacity as a matter of course and that subsequent actual wage earnings would not be used as a guide in determining post-injury wage earning capacity. In addition to the cost consequences to be borne out by the consumer, it was also urged that the inclusion of paragraph (23) would take away the injured employee's incentive to return to work. For these reasons and other administrative problems which this addition to Section 8(c) would create, the National Maritime Compensation Committee labeled the proposed paragraph (23) "unsound". (*Senate Hearings*, p.314-333)

In addition to the evidence and opinions, both pro and con, offered on the Senate bill under consideration, the bills introduced on the House side generated subcommittee hearings and similar testimony. The hearings on House Bill H.R. 12006 and H.R. 15023, both of which contained paragraph (23), were conducted before the Select Subcommittee on Labor of the Committee on Education and Labor. Three days of testimony and debate were held on June 27, July 18, and July 20, 1972. Witnesses before this subcommittee included Ralph Hartman of Bethlehem Steel (*House Hearings*, p.68-9; 76), Andrew Maisonpierre of the American Mutual Insurance Alliance (*House Hearings*, p.228-34). Frank Bonadio of the AFL-CIO Building and

Construction Trades Department (*House Hearings*, p.247), and Howard McGuigan, the AFL-CIO's Legislative Representative (*House Hearings*, p.254). Their testimony and written statements on the issue of permanent partial disability payments under the scheduled awards were basically similar to that given before the Senate subcommittee. Edward T. Vickery, representing the National Maritime Compensation Committee, offered the following testimony before the House subcommittee during questioning by Representative Daniels, the author of H.R. 12006:

> "The next section relating to compensation at the end of a scheduled award is a provision that we think is in conflict, as I believe Mr. Hartman indicated to the committee, with the present concept of the Longshoremen's Act of providing for specific weeks of compensation for a scheduled injury to an arm or leg or something of this nature and the partial loss of wage earning capacity concept for general disability injuries.
>
> For example, if a man had 25 percent permanent partial disability rating to his arm, after he was paid that he would then be potentially entitled to a partial loss of wages subsequent to that period of time.
>
> This particular provision is particularly onerous if you eliminate the $24,000 statutory maximum. I think what you would find in the administration of this is that most of the deputy commissioners would take the position that if a man has a 25 percent permanent partial disability to an arm or a leg that he has of necessity a loss of wage-earning capacity.
>
> Their position with respect to bank (sic) operations where partial loss of wage provisions apply now generally is that, following a laminectomy for

the removal of a herniated disk, a longshoreman has permanent physical disability of 15 or 20 percent. Many of them go back down on the waterfront and work and do as well after their accident as they did before.

As the Act is now drawn, they are not entitled to compensation unless they suffer a loss of wage-earning capacity. Their physical disability alone is not supposed to produce weekly compensation benefits as the act is administered. It is uniform for a partial loss of wages to be awarded, regardless of the fact that the man is doing just as well insofar as take-home pay is concerned, insofar as longshore wages are concerned on the waterfront.

This provision for specific member injuries, I have no doubt, would be interpreted substantially the same way with the basic approach being if a man has a 25-percent disability to his arm he has to have some loss of wage earning capacity and, therefore, once the schedule award is paid, it will give him a weekly award which would take him up to either the $24,000 maximum or pay him the rest of his life if you take the statutory maximum off."

Thus, it is readily apparent that the 92nd Congress, on both the Senate and House sides, had presented to it an abundance of information on the proposal to modify Section 8(c) so as to add a new Subsection (23) to do away with the limits of the various schedules, and to expand the compensability of the scheduled awards to include the wage-earning capacity impairment rationale applied in the "other cases" provision of Section 8(c)(21).

However, after consideration of the competing positions, both Senate Bill No. S.2318 and House Bills H.R. 12006 and 15023 were reported out of their committees with the proposed subsection (23) deleted, thereby

manifesting a Congressional intent that the schedules remain the sole basis for compensation under the Longshoremen's Act, notwithstanding that Congress had previously determined to compensate federal employees with scheduled permanent partial disabilities on a different basis, *i.e.*, by compensating for impaired earning capacity beyond the periods specified in the schedules.

II

THE JUDICIAL CONSTRUCTION OF THE ACT

After fifty-two years of uniform interpretation of Section 8(c) of the Longshoremen's and Harbor Workers' Compensation Act by the Courts, the majority of the panel deciding this action in the United States Court of Appeals for the District of Columbia Circuit has applied the section in a manner which disregards prior decisions of that circuit and others.

In examining the judicial interpretations of the Act, it is essential to bear in mind that Section 8, the Section of the Act which contains the award provisions, addresses itself to four basic categories of disability, each of which is governed by a separate subsection. These categories are permanent total disability (8(a)), temporary total disability (8(b)), permanent partial disability (8(c)), and temporary partial disability (8(e)).[8] The dictinctions and different rules governing the categories, particularly the meaning of permanent total disability resulting from an injury to a specific

[8] The various other provisions of Section 8 deal with the death of an employee receiving disability payments, an injury increasing a pre-existing disability, vocational rehabilitaton, the method of determning impairment of wage-earning capacity, and lump-sum settlements.

body member, has been the subject of judicial review of administrative decisions.

In 1940, the First Circuit found temporary total disability benefits proper where the injury was to a member of the body specifically scheduled in 8(c) and where the employee was capable of performing some light type of work. *Eastern S.S. Lines, Inc.* v. *Monahan*, 110 F.2d 840 (1st Cir., 1940). That case was decided on the temporary total benefits provision of the Act, and properly did not deal with Section 8(c), although the injury was to a scheduled member of the body.

The first significant discussion of the Congressional intent in cases of scheduled losses and wage earning capacity impairment was in *Traveler's Insurance Co.* v. *Cardillo*, 225 F.2d 137 (2nd Cir., 1955), cert. denied, 350 U.S. 913 (1955). That action involved a hearing impairment arising out of the employment, a scheduled loss under 8(c)(13). The issue before the Court was whether this occupational disease, as opposed to an accidental injury, warranted treatment under the scheduled member Section or the "other cases" treatment under 8(c)(21). Should the latter apply, there would be no permanent disability awarded because there was no evidence of an actual impairment to wage earning capacity. In ruling that actual impairment of wage-earning capacity was not a relevant issue in cases of permanent partial disability, the Court there stated:

> "... it remains for us to point out only that, in the case of schedule losses, the Congress has determined that a loss of wage-earning capacity and its extent are conclusively established when one of the enumerated physical impairments is proven to have arisen out of the employment.
>
> * * *

> In cases presently before us, there was ample evidence to sustain the Deputy Commissioner's findings of permanent binaural impairment of hearing arising naturally out of the claimants' employment and, consequently, the schedule loss formula provided for in the statute was properly invoked in accordance with the apparent Congressional intent conclusively to fix compensation for permanent partial loss of hearing." 225 F.2d 137, at p.144.

On the same issue and to the same effect, is *Bethlehem Steel Company* v. *Cardillo*, 229 F.2d 735 (2nd Cir., 1956). In addition to the Second Circuit, there is case law from the Fifth Circuit and Fourth Circuit indicating support for the holding of the Court in *Traveler's Insurance Company* v. *Cardillo, supra.*

In *Cox* v. *American Store Equipment Corporation*, 283 F.Supp. 390 (D.Md., 1968) a district Court of the Fourth Circuit was called upon to compare the Longshoremen's and Harbor Workers' Compensation Act with the Maryland compensation statute. In its analysis of the various permanent partial disability sections of the two statutes the Court stated:

> "Under the scheduled loss provisions of the Federal act, loss of wage-earning capacity and the extent thereof is conclusive established when any of the enumerated disabilities is proved. [citing]
>
> It is only when the injury falls within the purview of the "Other Cases" provision that a determination of loss of wage-earning capacity is required. * * *" 283 F.Supp. 390, 394

Another Fourth Circuit case recognized that there could be no recovery of permanent partial disability benefits absent a showing of actual wage earning ca-

pacity impairment in any case other than a scheduled injury listed in 8(c)(1) to (20), where such impairment was conclusively established. *Owens* v. *Traynor,* 274 F.Supp. 770 (D.Md., 1966); affirmed 396 F.2d 783 (4th Cir., 1968); cert. denied 393 U.S. 962 (1968).

The sole case on the precise issue presented here is *Williams* v. *Donovan,* 234 F.Supp. 135 (D.La., 1964); affirmed *per curiam* 367 F.2d 825 (5th Cir., 1966); cert. denied 386 U.S. 977 (1967), a case properly characterized as being on "all fours with this case" by the dissent below, but which was dismissed by the majority as being an unpersuasive conclusion of a District Court despite the *per curium* affirmance by the Fifth Circuit and the denial of a petition for Writ of Certiorari in this Court. The Plaintiff in *Williams, supra,* sought compensation for knee injury beyond that scheduled in § 8(c)(2) on the basis of actual impairment of wage-earning capacity. The Court rejected this contention and said:

> "* * * However, it has been held, and this Court fully agrees, that in passing the Act
>
> > 'Congress has determined that a loss of wage-earning capacity *and its extent* are conclusively established when one of the enumerated physical impairments is proven to have arisen out of the employment'
>
> This indicates a legislative determination that the wage-earning capacity loss in the case of a scheduled disability *shall be limited in extent to the compensation specified in the schedule, precluding this Court and the Deputy Commissioner from determining an award in any other manner.*" [Emphasis added.]

The majority opinion below rather relied upon its reading of *American Mutual Insurance Co. of Boston*

v. *Jones,* 138 U.S.App.D.C. 269, 426 F.2d 1263 (1970). However, Petitioner contends that *American Mutual* is not inconsistent with *Williams* or the intent of Congress, given the facts in that case. The injured employee in *American Mutual* sustained an injury to his arm, with his right hand useless for all but the lightest work. There was evidence that Plaintiff was not able to be retrained because of his limited intelligence and, in fact, had been unable to obtain employment over a period of years. Therefore, the case was decided as one of permanent *total* disability under 8(a) of the Act, which is distinct from 8(c)'s treatment of permanent partial disabilities. Section 8(a) provides that ". . . permanent total disability shall be determined in accordance with the facts", and further provides compensation benefits unlimited as to duration. In the case at bar, and unlike *American Mutual,* there was no finding that Mr. Cross was unable to work at all because of his injury.

In addition to the foregoing case law, the Court of Appeals of the Second Circuit has recognized that the Longshoremen's and Harbor Workers' Compensation Act calls for different treatment of scheduled and non-scheduled permanent partial disabilities in *Flamm* v. *Hughes,* 329 F.2d 378 (2nd Cir., 1964). In *Flamm,* the injured employee's widow challenged a Deputy Commissioner's award, claiming that Section 8(c) erected unconstitutional distinctions among the various types of permanent partial disabilities. Recognizing that Congress enjoyed great latitude in promulgating a statutory scheme for compensation of injured workers, the Court stated:

> "Nor is it irrational for Congress to provide a specific schedule of compensation limited to a pre-

> scribed number of weeks for enumerated permanent partial disabilities and yet provide compensation for an indefinite period of time for all other injuries leading to permanent partial disability." 329 F.2d 378, 380

The treatment of the two schemes of compensation under 8(c) as mutually exclusive was the basis of the claim and the predicate for the decision of the Court. Therefore, the District of Columbia Circuit's decision is also in conflict with the Second Circuit.

The majority decision below cited two post-1972 decisions of the Benefits Review Board[9] as finding the reasoning of *Williams* v. *Donovan,* supra, as unpersuasive, as well as its own expression that *Williams* represented only a district court's opinion in which the 5th Circuit did not discuss the exclusivity issue. Of the two cited decisions, only the *Dugger* case found its way to the 5th Circuit, where the court endorsed the continued viability of the earlier *Williams* holding. See *Jacksonville Shipyards Inc.* v. *Dugger,* 587 F.2d 197 (5th Cir., 1979). Curiously, the Court below made no reference to a later Benefits Review Board decision wherein the Board's Chairman dissented at length, emphasizing the exclusiveness of the schedules based upon the legislative history of the Act. See *Collins* v. *Todd Shipyards Corp.,* 9 BRBS 1015, 1026-1036 (1979).

The majority below relied upon what it viewed as a trend away from exclusivity in the state cases, drawing upon Larsen, *The Law of Workmen's Compensation* (1976) as support for its ruling. The majority

[9] The cases cited below were *Dugger* v. *Jacksonville Shipyards,* 8 B.R.B.S. 552 (1978), and *Brandt* v. *Avondale Shipyards, Inc.,* 8 B.R.B.S. 698 (1978).

below failed to appreciate the fact that such "trend" is based upon the particular wording of various state statutes, and even more significantly, that the exclusivity of the parent New York schedules was eliminated not by virtue of any such "trend" of decisions, but by a specific amendment to that statute in 1970. (See footnote 5). Moreover, the discussion in Professor Larsen's treatise, based upon some state statutes, cannot be said to be controlling as to the federal statute in view of its precise language and legislative history. Additionally, Professor Larsen's comments on the trend away from exclusivity of scheduled injuries is prefaced by his discussion of instances where an injury to a specific body member has an effect beyond the member alone.[10] Such is not the case in the present action.

The majority below likewise failed to appreciate the original Act's adoption of the schedules over the then Federal Employees' Compensation Act approach of case-by-case determinations of impaired earning capacity. In this regard, the question of administrative and judicial burden involved in case-by-case determinations is well recognized.[11]

Professor Larsen, in discussing the rationale for the schedule approach, states (§ 58.11, at p.1068):

> "* * * The basic theory remains the same; the only difference is that the effect on earning capacity is a conclusively presumed one, instead of a specifi-

[10] 2 *A. Larsen, The Law of Workmen's Compensation,* § 58.20 (1976).

[11] Under the decision below, the question should arise in virtually every case under the schedules, so as to determine whether compensation for the claimant's impaired earning capacity under Section 8(c)(21) is greater or less than the compensation under the applicable schedule.

cally proved one based on the individual's actual wage-loss experience. The effect must necessarily be a presumed one, since it would be obviously unfair to appraise the impact of a permanent injury on earning capacity by looking at claimant's earning record for some relatively short temporary period preceding the hearing. The alternative is to hold every compensation case involving any degree of permanent impairment open for a lifetime, making specific calculations of the effect of the impairment on claimant's earnings each time claimant contends that his earnings are being adversely affected. To avoid this protracted administrative task, the apparently cold-blooded system of putting average price tags on arms, legs, eyes, and fingers has been devised".

Moreover, two of the Circuits have similarly recognized:

> "Schedules are set up not to put a "price" on certain parts of the human body, but to ameliorate an alternative intolerable administrative burden by providing a certain and easily applied method of determining the effect on wage earning capacity of typical and classifiable injuries". See *Iacone* v. *Cardillo*, 208 F.2d 696, 699 (2nd Cir., 1953); and *Rupert* v. *Todd Shipyards Corp.*, 239 F.2d 273, 275 (9th Cir., 1956)

Thus, it is submitted that the Congress in purposely adopted the New York approach of utilizing schedules to conclusively establish, and to compensate for loss of earning capacity as to certain enumerated losses to specific parts of the body, eschewed the case-by-case approach of adjudicating an individuals' loss of earning capacity. This election was made not only at the time of the Act's original adoption in 1927, but again in 1972 when the Act was extensively amended. Thus,

the decision below was in error, for it disregarded not only the clear language of the statute, but also disregarded its history and the construction thereof during the 53 years of its existence.

CONCLUSION

Petitioner accordingly urges this Court to reverse the decision of the United States Court of Appeals for the District of Columbia Circuit and remand the case for a proper determination of the percentage of the scheduled benefits to which Mr. Cross should have been entitled under 33 U.S.C. § 980(c)(2), (19).

Respectfully submitted,

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STATUTORY APPENDIX

Longshoremen's and Harbor Workers' Act.
33 U.S.C. 901

D.C. Code 36-501, *et seq.*

STATUTORY APPENDIX

33 U.S.C. § 908

§ 908 Compensation for disability

Compensation for disability shall be paid to the employee as follows:

(a) Permanent total disability: In case of total disability adjudged to be permanent 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance of such total disability. Loss of both hands, or both arms, or both feet, or both legs or both eyes, or of any two thereof shall, in the absence of conclusive proof to the contrary, constitute permanent total disability. In all other cases permanent total disability shall be determined in accordance with the facts.

(b) Temporary total disability: In case of disability total in character but temporary in quality 66⅔ per centum of the average weekly wages shall be paid to the employee during the continuance thereof.

(c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

(1) Arm lost, three hundred and twelve weeks' compensation.

(2) Leg lost, two hundred and eighty-eight weeks' compensation.

(3) Hand lost, two hundred and forty-four weeks' compensation.

(4) Foot lost, two hundred and five weeks' compensation.

(5) Eye lost, one hundred and sixty weeks' compensation.

(6) Thumb lost, seventy-five weeks' compensation.

(7) First finger lost, forty-six weeks' compensation.

(8) Great toe lost, thirty-eight weeks' compensation.

(9) Second finger lost, thirty weeks' compensation.

(10) Third finger lost, twenty-five weeks' compensation.

(11) Toe other than great toe lost, sixteen weeks' compensation.

(12) Fourth finger lost, fifteen weeks' compensation.

(13) Loss of hearing: Compensation for loss of hearing of one ear, fifty-two weeks. Compensation for loss of hearing of both ears, two hundred weeks.

(14) Phalanges: Compensation for loss of more than one phalange of a digit shall be the same as for loss of the entire digit. Compensation for loss of the first phalange shall be one-half of the compensation for loss of the entire digit.

(15) Amputated arm or leg: Compensation for an arm or a leg, if amputated at or above the elbow or the knee, shall be the same as for a loss of the arm or leg; but, if amputated between the elbow and the wrist or the knee and the ankle, shall be the same as for loss of a hand or foot.

(16) Binocular vision or per centum of vision: Compensation for loss of binocular vision or for 80 per centum or more of the vision of an eye shall be the same as for loss of the eye.

(17) Two or more digits: Compensation for loss of two or more digits, or one or more phalanges of two or more digits, of a hand or foot may be proportioned to the loss of use of the hand or foot occasioned thereby, but shall not exceed the compensation for loss of a hand or foot.

(18) Total loss of use: Compensation for permanent total loss of use of a member shall be the same as for loss of the member.

(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

(20) Disfigurement: Proper and equitable compensation not to exceed $3,500 shall be awarded for serious disfigurement of the face, head, or neck or of other normally exposed areas likely to handicap the employee in securing or maintaining employment.

(21) Other cases: *In all other cases* in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest. [emphasis supplied]

* * * * *

(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivisions (c)(21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such

wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.

* * * *

D.C. Code § 36-501

§ 36-501. Longshoremen's and Harbor Workers' Compensation Act made applicable to the District of Columbia.

The provisions of chapter 18 of title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person. (May 17, 1928, 45 Stat. 600, ch. 612, § 1.)

APPENDIX A

Opinion Below of the United States Court of Appeals for the District of Columbia Circuit

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 78-1073

POTOMAC ELECTRIC POWER COMANY, PETITIONER

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR, AND TERRY M. CROSS, RESPONDENTS

Petition for Review of an Order of the Benefits Review Board of the United States Department of Labor

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Argued March 22, 1979

Decided August 24, 1979

Judgment entered this date

Richard W. Turner, with whom *Nicholas D. Ward* was on the brief, for petitioner.

William F. Krebs, with whom *Leslie Scherr* was on the brief, for respondent Terry M. Cross.

Bills of costs must be filed within 14 days after entry of judgment. The court looks with disfavor upon motions to file bills of costs out of time.

Mark C. Walters, Attorney, Department of Labor, for respondent Department of Labor. *Cornelius S. Donoghue, Jr.*, Attorney, Department of Labor, entered an appearance for respondent Department of Labor.

Before WRIGHT, *Chief Judge*, and SWYGERT * and MACKINNON, *Circuit Judges*.

Opinion for the court filed by *Chief Judge* WRIGHT.

Dissenting opinion filed by *Circuit Judge* MACKINNON.

WRIGHT, *Chief Judge*: On December 7, 1974 Terry M. Cross, Jr., a Class A cable splicer with the Potomac Electric Power Company (PEPCO), injured his left knee while on the job. The injury was sufficiently serious to require corrective surgery to remove the medial meniscus —fibrocartilage of the knee joint—from that knee. Because a Class A cable splicer performs many strenuous chores—including climbing ladders and scaffolding, crawling in and out of manholes, and lifting heavy equipment —the residual pain, discomfort, and unsteadiness experienced by Cross upon his return to work prevented him from discharging the duties of that position. PEPCO nonetheless continued to list Cross on the roster of Class A cable splicers and to pay him at the straight hourly rate for that classification. Cross found this arrangement unsatisfactory, however, because PEPCO refused to accord him the routine raises granted to others in his work classification and to allow him any of the overtime work that he had become accustomed to receiving over the years.

In February 1976 Cross filed a claim for compensation under the Longshoremen's and Harbor Workers' Compen-

* Of the Seventh Circuit, sitting by designation pursuant to 28 U.S.C. 291(a) (1976).

sation Act.[1] Because he and PEPCO could not agree on a method for computing compensation, the matter proceeded to a formal hearing before an Administrative Law Judge (ALJ). After receiving medical testimony that characterized Cross's injury as a five to 20 percent disability of the leg, the ALJ concluded that "Claimant has become permanently partially disabled because of the accident [and] can no longer perform the rigorous work of a Cable Spicer A * * *."[2] Noting that Cross lost overtime work and pay raises due to the injury, the ALJ awarded him compensation under Section 8(c)(21) of the Act.[3] The award, as specified by that section, was based on the difference between Cross's pre-jury weekly wages and his post-injury wage-earning capacity.[4]

PEPCO appealed the ALJ's decision to the Department of Labor's Benefits Review Board and urged there that Sections 8(c)(1)-(20) of the Act,[5] providing scheduled

[1] 33 U.S.C. § 901 *et seq.* (1976). The Longshoremen's and Harbor Workers' Compensation Act is made applicable to the District of Columbia by 36 D.C. Code § 501 (1973).

[2] Joint Appendix (JA) 5-6.

[3] 33 U.S.C. § 908(c)(21).

[4] The ALJ concluded that Cross's lost earning capacity owing to the injury equaled $130.13 per week. This figure was arrived at by determining the amount of the base pay increases that Cross was denied after the injury and the amount of overtime pay lost due to the injury. The latter amount was based on the ratio of overtime to base earnings for 1972, 1973, and 1974. JA 3-4. Under 33 U.S.C. § 908(c)(21) Cross was entitled to weekly compensation of 66 2/3% of his lost earnings, which totaled $86.76 per week. The statute's compensatory scheme is described in text at notes 13-18 *infra*.

[5] 33 U.S.C. §§ 908(c)(1)-(20). PEPCO specifically urged that compensation be based on 33 U.S.C. § 908(c)(2), which provides compensation for permanent partial disability based on lost use of a leg, and on 33 U.S.C. § 908(c)(19), which

allowances for specified injuries, ought to have been used as the basis for awarding compensation rather than Section 8(c)(21). The Board held, however, that the scheduled benefits contained in Sections 8(c)(1)-(20) are not exclusive remedies and that, if a claimant can prove a loss in wage-earning capacity greater than that provided for in the schedule, he may pursue a claim under Section 8(c)(21).[6] Because the ALJ had found that Cross had sustained a loss in earning capacity greater than the compensation provided by the schedule, the Board affirmed the initial decision.[7] PEPCO, contending that the Board's analysis was premised on a faulty reading of the Act, petitions this court to set aside the Board's decision.[8]

This court must determine whether the decision of the Benefits Review Board to affirm the judgment of the ALJ is consistent with applicable law.[9] Under the Act the Board was bound to regard the ALJ's findings of fact as conclusive if supported by substantial evidence in the record considered as a whole.[10] The Board decided that the ALJ's findings were so supported,[11] and we see no reason to disagree. Nor does PEPCO press before us the claim that the Board misapplied the substantial evidence standard. Rather, PEPCO argues that both the Board

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provides for proportional compensation for partial loss of use of a member.

[6] JA 13-14.

[7] *Id.*

[8] 33 U.S.C. § 921(c).

[9] *See Atlantic & Gulf Stevedores, Inc. v. Director, Office of Wkrs' Comp. Programs*, 542 F.2d 602, 608 (3d Cir. 1976); *Presley v. Tinsley Maintenance Service*, 529 F.2d 433, 436 (5th Cir. 1976).

[10] 33 U.S.C. § 921(b)(3).

[11] JA 12.

and the ALJ erred by compensating Cross under the wrong provision of the Act. Specifically, PEPCO contends, as it did before the ALJ and the Board, that a failure to regard the scheduled benefits in Sections 8(c)(1)-(20) as exclusive remedies is an error in law. If PEPCO is correct in this respect, of course, reversal is mandated.

Analysis must commence with the general proposition that the act whose construction is at issue is remedial in nature and must be construed in light of its humanitarian objectives. In the words of the Supreme Court,

> The measure before us * * * requires employers to make payments for the relief of employees and their dependents who sustain loss as a result of personal injuries and deaths occurring in the course of their work, whether with or without fault attributable to employers. Such laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them. They are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were enacted and, if possible, so as to avoid incongruous or harsh results. * * * [12]

Yet though a liberal construction of the Act is in order, we are mindful that no court has license to rewrite this or any other act of Congress.

The Act's compensatory scheme encompasses four classes of disability: permanent total,[13] temporary total,[14]

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[12] *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 414 (1932). *Accord, Voris v. Eikel*, 346 U.S. 328, 333 (1953). *See* 2 A. LARSON, THE LAW OF WORKMEN'S COMPENSATION § 58.20 at 10-218 (1976).

[13] 33 U.S.C. § 908(a).

[14] 33 U.S.C. § 908(b).

permanent partial," and temporary partial."[16] It is undisputed that Cross falls in the third category—permanent partial disability. The Act compensates disabilities of this type in one of two ways. First, in Sections 8(c)(1)-(20) the Act enumerates specific injuries—ranging from loss of an arm to disfigurement—for which the successful claimant is to receive compensation totaling two-thirds of his average weekly wages for a prescribed number of weeks. A lost arm, for example, occasions 312 weeks' compensation at that level.[17] The second method of compensation, contained in Section 8(c)(21), applies to "all other cases" and provides for compensation amounting to two-thirds of "the difference between [the claimant's] average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise * * *."[18]

PEPCO's contention that compensation based on Section 8(c)(21) is in error rests largely on its conception of the statutory scheme. Its argument, in brief, is that when Congress enumerated specific injuries in succession and then tacked on an additional provision applicable to "all other cases" it had in mind two mutually exclusive categories. This structural arrangement, according to PEPCO, makes clear that Sections 8(c)(1)-(20) represent the exclusive remedy for disabilities caused by the specified injuries. We believe, however, that there is another, more rational, way of reading the statute.

The statute defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other

[16] 33 U.S.C. § 908(c).

[17] 33 U.S.C. § 908(e).

[18] 33 U.S.C. § 908(c)(1).

[19] 33 U.S.C. § 908(c)(21).

employment."[19] Yet under the permanent partial disability classification the scheduled injuries are by their very nature considered to be compensable regardless of their concrete impact on the employee's wage-earning capacity. As the Board wrote, "The schedule * * * contemplates an easily administered system of compensation, where a claimant need not prove a loss in wage-earning capacity. Rather, the loss in wage-earning capacity is presumed without reference to claimant's actual occupation."[20] But there is another form that compensation for permanent partial disability may take—that contained in Section 8(c)(21). To establish an entitlement to compensation under this provision the claimant must prove that the injury has resulted in an actual diminution of earning capacity. Thus, although Cross's work-related injury is confined to his left knee—for which he is eligible for compensation under the scheduled benefits[21]—the injury also renders his entire body, as a functioning economic unit, permanently partially disabled. Because he is capable of establishing the actual diminution in earning capacity required for compensation under Section 8(c)(21), he is brought within that part of the compensatory scheme. Reading the statute in this way yields the conclusion that a claimant's showing of economic disability in excess of the scheduled loss is one of the "other cases" provided for in Section 8(c)(21).

The latter conception of the statutory scheme accords not only with the statute's remedial objectives,[22] but also with this court's decision in *American Mutual Ins. Co. of*

[19] 33 U.S.C. § 902(10).

[20] JA 13 (*citing Travelers Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir.), *cert. denied*, 350 U.S. 913 (1955)).

[21] 33 U.S.C. §§ 908(c)(2), (19).

[22] *See* text at note 12 *supra*.

Boston v. Jones.[23] In *Jones* we held that the compensation for a claimant who had lost use of a hand was not to be based on the scheduled injury provision,[24] but rather on the method for computing compensation under the permanent total disability section of the statute.[25] Pointing out that " 'disability' is an economic and not a medical concept," [26] we concluded that "[e]ven a relatively minor injury must lead to a finding of total disability if it prevents the employee from engaging in the only type of gainful employment for which he is qualified." [27] Although *Jones* did not deal with permanent partial disability, the reasoning it employed to free the deserving claimant from the fetters of the scheduled injury provisions applies equally here. Permanent partial disability, no less than total disability, is an economic concept whose meaning in any single case is tied inextricably to the claimant's wage-earning capabilities. Where the scheduled benefits fail adequately to compensate for a diminution in those capabilities, Section 8(c)(21) is the remedial alternative.[28]

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[23] 426 F.2d 1263 (D.C. Cir. 1970).

[24] 33 U.S.C. § 908(c)(3).

[25] 33 U.S.C. § 908(a).

[26] 426 F.2d at 1265 (*citing* 33 U.S.C. § 902(10)).

[27] *Id.* at 1266.

[28] It may be argued that the scheduled benefits at times *over*compensate a particular claimant whose wage-earning capacity has not been diminished by a scheduled injury. An attorney who loses use of an arm, for example, is presumably as capable of performing his legal functions after as before his injury, but he would nonetheless be eligible for scheduled benefits. It follows, the argument continues, that this injury, too, would be subject to compensation based on § 8(c)(21), which is to say that the hypothetically injured attorney would go uncompensated.

The apparent symmetry achieved by this argument is only superficially pleasing, however, for §§ 8(c)(1)-(20) represent a conclusive congressional determination that certain injuries entitle a claimant to benefit on grounds that he is *injured*, not on grounds that he is actually *disabled*. (The latter term, it will be remembered, is an economically tied notion under the statute.) This congressional determination in effect constructs a compensatory floor that individual claimants, such as the present one, may exceed by resort to § 8(c)(21) if able to establish a sufficient level of disability owing to the injury.

Our refusal to confine the claimant in this case to the scheduled injury provisions accords as well with the recent trend in workmen's compensation law away from the idea of exclusivity of scheduled benefits. As Professor Larson has written,

> Although it is difficult to speak in terms of a majority rule on this point, because of significant differences in statutory background, it can be said that at one time the doctrine of exclusiveness of schedule allowances did dominate the field. But in recent years there has developed such a strong trend in the opposite direction that one might now, with equal justification, say that the field is dominated by the view that schedule allowances should not be deemed exlusive, whether the issue is treatment of a smaller member as a percentage loss of a larger, or treatment of any scheduled loss as a partial or total disability of the body as a whole.[29]

Although Professor Larson relies primarily on state cases to support his observation,[30] the reasoning in those cases applies with equal force at the federal level.[31]

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[29] 2 A. LARSON, *supra* note 12, § 58.20 at 10-212 to 10-214 (footnotes omitted).

[30] *See id.* § 58.20 at 10-213 n.27 (citing cases); *id.* (Feb. 1979 Supp.) (citing cases).

[31] For an example of a state court's reasoning, *see, e.g.*, *Van Dorpel v. Haven-Busch Co.*, 350 Mich. 135, 85 N.W.2d 97, 102 (1957):

[continued]

PEPCO also contends that the exclusivity of the scheduled benefits is supported by precedent in the federal system. In particular, PEPCO relies on *Williams v. Donovan*,[32] a 1964 District Court judgment affirmed in a one-paragraph *per curiam* opinion by the Fifth Circuit. The claimant in *Williams* also suffered an injury to his knee. In authorizing compensation under the scheduled benefits, the District Court expressly endorsed the exclusivity of those benefits. The Fifth Circuit did not discuss the exclusivity issue in its brief opinion affirming.

In light of the clear trend in workmen's compensation law away from exclusivity, we simply find the District Court's conclusion in *Williams* unpersuasive.[33] Moreover,

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> [The purpose of the schedule is] to consult broad industrial experience and lay down an irreducible minimum number of weeks allowable for certain common specific losses—thus removing the issue from costly and delaying litigation at a time when the workman was most helpless and his need the greatest—leaving the question of further disability and compensation to be determined on proofs made at a hearing * * *, having due regard for the nature and extent of the injuries, the then capacities and general condition of the workman, and the kind of job he had before his injury[.] * * *

As a further indication of the clear trend away from exclusivity, the New Mexico case of *Casados v. Montgomery Ward & Co.*, 78 N.M. 392, 432 P.2d 103 (1967), on which PEPCO relies as support for exclusivity, has recently been overruled by *American Tank & Steel Corp. v. Thompson*, 90 N.M. 513, 565 P.2d 1030 (1977), which held that a schedule is not an exclusive remedy.

[32] 234 F.Supp. 135 (E.D. La. 1964), *aff'd*, 367 F.2d 825 (5th Cir. 1966) (*per curiam*), *cert. denied*, 386 U.S. 977 (1967).

[33] The Benefits Review Board, which in 1972 replaced the District Courts as initial review tribunals under the Act, *see* 33 U.S.C. § 921(b), (c), has also found the reasoning in

Williams was decided prior to this court's opinion in *Jones*, and we see nothing in the District Court's opinion to deflect the force of the reasoning in *Jones*. Drawing upon that reasoning, and upon the remedial thrust of the statute at large, we hold that a showing of economic disability in excess of the scheduled loss is one of the "other cases" provided for in Section 8(c)(21).

Accordingly, the decision of the Benefits Review Board is

Affirmed.

Williams unpersuasive in cases in addition to the one before us today. *See, e.g., Dugger v. Jacksonville Shipyards*, 8 B.R.B.S. 552 (1978); *Brandt v. Avondale Shipyards, Inc.*, 8 B.R.B.S. 698 (1978).

MACKINNON, *Circuit Judge, dissenting*: Section 8 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 908 (1976), contains a schedule of benefits in which Congress has conclusively presumed the compensation due an employee who sustains an enumerated injury in the course of his employment. Nothing in section 8 permits an employee whose injury is unquestionably confined to one of those set out in the schedule to circumvent Congress' conclusive presumptions with a showing of lost earning capacity in excess of the specified benefit. The majority holds otherwise, and does so despite the fact that during the fifty-two year old regime of an essentially unaltered statutory scheme no federal court has ever read section 8 in that manner while a number of federal courts have adopted a contrary approach. I am not unsympathetic to the result the majority's holding achieves, but I submit that it is within the province of the legislative branch to weigh and decide whether this result ought to obtain. Accordingly, I dissent.

I

The material facts in this case are not in dispute. Respondent Cross worked for the Potomac Electric Power Company (PEPCO) as a Class A cable splicer, a position in which he was able to obtain some overtime work. The concededly rigorous work of a Class A cable splicer requires one to possess the physical agility to climb ladders and scaffolds, lift heavy equipment, get in and out of manholes, and the like. In December 1974, while working in a manhole, Cross twisted his left knee and tore a cartilage which had to be surgically removed. The doctor who performed the operation later testified that the operation had been a success but that Cross had sustained a 5% partial disability of his left leg. Another physician rated Cross' disability somewhat higher—approximately 20% disability of his left leg.

When Cross returned to work he was placed on the light duty roster. While he remained listed as a Class A cable splicer and received the normal base wage PEPCO pays employees in that position, Cross no longer performed the rugged tasks in which other cable splicers engaged. He worked no overtime. Apparently in consequence of his light-duty status, PEPCO denied Cross in-grade raises awarded to other Class A cable splicers in 1975.

PEPCO and Cross were unable to agree on a method for compensating the latter's disability and so the matter was referred to an administrative law judge. Following a hearing on the claim, the administrative law judge filed findings of fact in which he recounted the testimony of the two physicians whose joint estimate rated Cross' disability as a 5% to 20% loss of use of his left leg. There was no other testimony relating to injuries Cross sustained. There was no finding that Cross' injury extended to a part of his body other than the left leg.

PEPCO contended that on this evidence the statute compelled an award under section 8(c)(2), (19), which establishes the benefits due for the partial loss of use of a leg. The administrative law judge disagreed, holding that because Cross had shown a loss of wage earning capacity (through loss of overtime and denied wages) in excess of the scheduled benefit, he was entitled to elect compensation under section 8(c)(21), which contains a formula for "other cases." Using this formula, the administrative law judge awarded Cross two-thirds of the amount of lost overtime based on Cross' earnings during the period 1972-1974.

On PEPCO's appeal, the Benefits Review Board upheld the administrative law judge's findings of fact and conclusions of law. Citing no authority other than two recent decisions of its own, the Board reasoned that "if a claim-

ant can prove a loss in wage-earning capacity greater than that provided in the schedule, he may pursue a claim under Section 8(c)(21)." It is this conception of section 8(c)(21) that PEPCO challenges here.

II

I fully agree with the majority that our chore here is to interpret a statute, not second guess resolutions of disputed fact. I concur in its view that if the Board erred in compensating Cross under section 8(c)(21), this court must reverse the Board's decision. I believe that if the majority indeed interpreted section 8(c)(21) in accordance with the ordinary rules of statutory construction, it would join in concluding that the Board erred in compensating Cross thereunder and hence that reversal of the Board's decision is required.

The touchstone of statutory construction is the language of the statute. The inquiry begins not with conjecture about what Congress would have liked to have said when it wrote the statute or with what Congress would say today given the chance, but rather with what Congress indeed expressed in the statutory text. *See* 2A C. Sands, *Sutherland Statutory Construction* § 45.07 (4th ed. 1973). The plain and ordinary meaning of the words Congress used guides this inquiry. *Richards v. United States*, 369 U.S. 1, 9 (1961); *Lynch v. Alworth-Stephens Co.*, 267 U.S. 364, 370 (1925). "Where the language is plain and admits of no more than one meaning the duty of interpretation does not arise and the rules which are to aid doubtful meaning need no discussion." *Caminetti v. United States*, 242 U.S. 470, 485 (1916); *accord, Jay v. Boyd*, 351 U.S. 345, 357 (1956); *Packard Motor Co. v. National Labor Relations Board*, 330 U.S. 485, 492 (1947). Although the identification of the ordinary meaning of a statutory term is itself an exercise in interpretation, *see* 2A C. Sands, *supra*, § 45.02, the *Caminetti* principle counsels courts to avoid exploratory frolics into

subjective policy considerations when the common and natural meaning of the words in a statute directs the court to a particular and unavoidable result.

III

There is no difficulty in identifying the meaning of the words Congress used in section 8(c) to describe the benefits due a permanently partially disabled employee who sustains a partial loss of use of one leg. The statute provides:

> Compensation for disability shall be paid as follows:
>
> . . . .
>
> (c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66 2/3 per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:
>
> . . . .
>
> (2) Leg lost, two hundred and eighty-eight weeks' compensation
>
> . . . .
>
> (19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of a member.

33 U.S.C. § 908 (1976).

The clear import of this language is that when a claimant sustains a permanent partial disability owing to the partial loss of use of a leg he is to receive two-thirds of his average weekly wage for a period corresponding to the proportion of 288 weeks which his injury bears to the loss of a leg. In this case, Cross is permanently partially disabled owing to a 5-20% loss of use of a leg.

That was the finding of the administrative law judge and there is no finding of injury beyond that. We cannot second guess his factual resolutions. Cross is thus entitled to two-thirds of his average weekly wage for a period comprising some portion of 288 weeks.

The majority's contrary result springs from section 8(c)(21), the second to last paragraph of the Longshoremen's Act's schedule of benefits. It provides:

> Other cases: In all *other* cases in this class of disability the compensation shall be 66 2/3 per centum of the difference between his average weekly wages and in wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest.

33 U.S.C. § 908(c)(21) (1976) (emphasis added).

This "other cases" clause certainly contains a compensatory scheme different from that applicable to the specified injuries immediately preceding it in the statute. Whereas permanently partially disabled claimants falling under the specific schedule receive two-thirds of their average weekly wages for a pre-determined period of time, permanently partially disabled claimants falling into the "other cases" provision receive two-thirds of the difference between their pre- and post-injury earning capacity for an indefinite period. But the existence of two avenues of compensation does not necessarily mean that claimants have a choice between the two. It is the availability of the choice, not the existence of two schemes, that is the issue in this case. I submit that the language of the statute is barren of any indication that the choice the majority presumes indeed exists.

The key is the underscored word "other." To my mind this word manifests that Congress intended to fashion two different schemes for two different species of permanently partially disabled claimants. The dictionary defines "other" as describing something "[d]ifferent or distinct from that already mentioned." *Black's Law Dictionary* 1253 (4th ed. 1968); *see Missouri Pacific Railroad Co. v. Campbell*, 502 S.W.2d 354, 358 (Mo. 1973); *Webster's New International Dictionary* 1729 (2d ed. 1959). The "all other cases" to which section 8(c)(21) applies refers to cases "different or distinct" from cases already mentioned, namely, the cases set out in the schedule. If the injury is one described in the schedule, then the benefits mandated therein control; if the injury is different or distinct from one set out in the schedule, then the "other cases" provision controls.

The "other cases" provision has an important but limited role to play in workmen's compensation. The schedule of benefits contained in section 8(c) does not exhaust the range of conceivable work-related injuries. Reflecting the primary concerns of the industrial age in which it was adopted, the enumerated injuries schedule focuses on anatomical losses such as arms, legs, hands, fingers, toes, and the like. The schedule makes no specific provision for injuries such as a heart attack, a hernia, a back impairment, a cancer, or a mental disorder. Rather than attempt to anticipate and itemize every imaginable work-related misfortune that innumerable employment conditions might engender, Congress needed a catch-all provision to encompass claims based on injuries not identified in the schedule. Hence the "other cases" provision. Insofar as the provision concerns us on the facts of this case, the words "other cases" really mean "heart attack cases," "hernia cases," and other non-scheduled injuries.

I would hold that only a finding of an injury different from or more extensive than one of those specified in the schedule triggers the "other cases" provision. There being no such finding here, I would vacate the Board's order.

IV

The legislative history of the Longshoremen's Act contains no clear answer to the question at bar, but I think it is fair to infer from that history that Congress did not intend the construction the majority endorses. Congress enacted the Longshoremen's Act in 1927. Act of March 4, 1927, Pub. L. No. 803, chap. 509, 44 Stat. 1427. The proposal that ultimately became law was introduced in the Senate the year before as S.3170. As recommended by the Senate Committee and adopted by the Senate, S.3170 had no schedule of benefits. *See* 67 Cong. Rec. 10614 (1926). The bill instead provided that the compensation provisions of the Federal Employees Compensation Act would control. S. Rep. No. 973, 69th Cong., 1st Sess. 2-3 (1926); 67 Cong. Rec. 10614 (1926) (remarks of Sen. Walsh). At that time, the Federal Employees Compensation Act provided for compensation on the basis of two-thirds of the difference between the claimant's pre- and post-injury earning capacity. *See* 5 U.S.C. §§ 754, 756 (1926 ed.) (enacted as Act of September 7, 1916, Pub. L. No. 267, chap. 258, § 4, 39 Stat. 743).

The House Committee did not accept the earning capacity provision and amended S.3170 to include a schedule of benefits. H.R. Rep. No. 1767, 69th Cong., 2d Sess. 4 (1927); 68 Cong. Rec. 5404 (1927). The Report accompanying this change explained that the Committee had reshaped the Senate bill along the lines of a House proposal that the Committee had recommended for passage the year before. H.R. Rep. No. 1767, *supra*, at 20. The House Committee Report on that earlier proposal revealed that the provisions of the bill had been borrowed from the New York workmen's compensation statute. H.R. Rep. No. 1190, 68th Cong., 2d Sess. 2 (1926); *see Travelers Insurance Co. v. Cardillo*, 225 F.2d 137, 143

(2d Cir.), *cert. denied*, 350 U.S. 913 (1955); 68 Cong. Rec. 5412 (1927) (remarks of Rep. O'Connor). The New York statute, like the House Committee version of S.3170, contained a schedule of benefits and an "other cases" clause. *Compare* N.Y. Workmen's Compensation Law § 15(3), ¶ v (1927) *with* H.R. Rep. No. 1767, *supra*, at 4. The House adopted the House Committee version, 68 Cong. Rec. 5414 (1927), and the Senate concurred in the bill as amended, *id.* at 5909.

Three features of the foregoing are noteworthy. First, Congress rejected a compensatory scheme for all injuries solely based on lost earning capacity. It opted instead to specify particular injuries and thereby to create a conclusive presumption on the benefits due a claimant who sustains a scheduled injury. This reflects a desire to avoid a case-by-case determination in situations involving what were then the most common industrial injuries. Second, this effort to avoid case-by-case contention of benefits is consistent with the statute's overall goal of putting an end to the costly and time-consuming actions for damages at common law. This concern and the parallel concern of administrative orderliness that is crucial to understanding the concept of scheduled benefits permeate the sparse record of legislative deliberations. *See, e.g.*, H.R. Rep. No. 1767, *supra*, at 19-20; 68 Cong. Rec. 5410 (1927) (remarks of Rep. Graham). Third, the federal statute, and in particular the schedule of benefits, was lifted from the New York statute. Although New York's understanding of what its statute means is not binding on us, it is certainly probative of what Congress believed it was adopting when it imported New York's schedule into the federal scheme. In a decision issued not long after Congress adopted the New York schedule in the Longshoremen's Act, the New York Court of Appeals found self-evident the answer to the question this court confronts today:

> Obviously, the phrase "in all other cases" signifies that the provisions of the paragraph shall apply only in cases where the injuries received are not confined to a specific member or specific members.

Sokolowski v. Bank of America, 184 N.E. 492, 494 (N.Y. 1933).

The construction of the "other cases" provision in section 8(c)(21) that the majority reaches contradicts each of these features of the legislative history of the Longshoremen's Act. Ignoring Congress' rejection of a provision which would have permitted Cross compensation solely based on proof of lost earning capacity, the majority fashions precisely such a provision out of the "other cases" clause. Neglecting to note that the purpose underlying the compensation laws was to put an end to administratively burdensome and litigious confrontations on the amount of compensation due an employee for a specified injury, the majority supports an interpretation of the "other cases" provision which opens the door to case-by-case determinations of benefits Congress conclusively presumed in the schedule. And, finally, the majority's interpretation flouts the "obvious" meaning given the "other cases" clause contained in the statute on which the Longshoremen's provision was based.

Congress has amended the Longshoremen's Act a number of times since 1927. *See, e.g.*, Act of October 27, 1972, Pub. L. No. 92-576, 86 Stat. 1252; Act of July 26, 1956, Pub. L. No. 84-803, 70 Stat. 655; Act of June 24, 1948, chap. 623, 62 Stat. 602; Act of June 25, 1938, chap. 685, 52 Stat. 1164; Act of May 26, 1934, chap. 354, 48 Stat. 806. *The "other cases" provision, however, remains unchanged since its original enactment in 1927.* Congress has referred to the provision on at least two occasions in amending other provisions of the statute, and these two comments support an interpretation based on the plain meaning of the words in section 8(c)(21).

In 1938, Congress amended the statute to include the current section 8(h), which specifically relates to the computation of wage earning capacity under section 8(c)(21). Act of June 25, 1938, chap. 685, § 5, 52 Stat. 1165 (codified at 33 U.S.C. § 908(h) (1976)). Both the House and the Senate Reports on the proposed legislation expressed alarm at the "wasteful litigation" which "other cases" claims under section 8(c)(21) frequently occasioned, and both used the example of an "industrial hernia," a non-schedule injury, to describe the kind of cases falling into that category. *See* S. Rep. No. 1988, 75th Cong., 3d Sess. 5 (1938); H.R. Rep. No. 1945, 75th Cong., 3d Sess. 5 (1938). There is no indication in these reports that Congress intended the "other cases" provision to extend to claims based on injuries specified in the schedule.

In the most recent amendment of the statute in 1972, Congress clarified the "second injury" provisions, adopting different benefits for scheduled and nonscheduled injuries. In referring to the benefits available in situations compensable under section 8(c)(21), the House Report explained that "[i]n the case of injuries *not described in section 8(c)(1)-(20)*" certain benefits would obtain. H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. 18 (1972) (emphasis added). This indicates Congress' understanding that the "other cases" provision included only injuries "not described in" the schedule.

V

Congress is no stranger to the problem we confront here of a permanently partially disabled claimant whose lost earning capacity from a scheduled injury is not fully redressed by the scheduled benefit, for Congress amended the Federal Employees' Compensation Act to accommodate precisely this concern.

As noted above, when originally enacted the Federal Employees Compensation Act did not contain a schedule

of benefits; it compensated claims based on all injuries with the same formula section 8 of the Longshoremen's Act confines to "other cases." In 1949 Congress amended the statute to provide for scheduled benefits for permanent partial disability. Act of October 14, 1949, chap. 691, § 104, 63 Stat. 855. The Committee reports accompanying the measure in each chamber stated that this change was intended to bring the statute in line with the prevailing practice in most American jurisdictions. S. Rep. No. 836, 81st Cong., 1st Sess. 17 (1949); H.R. Rep. No. 729, 81st Cong., 1st Sess. 7 (1949); *see* 95 Cong. Rec. 8756 (1949) (remarks of Rep. Keating). One Senate sponsor of the bill noted that the schedule was to conform to the one contained in the Longshoremen's Act. 95 Cong. Rec. 13607 (1949) (remarks of Sen. Douglas).

There was one important addition in the 1949 amendments which distinguishes the Federal Employees Compensation Act from the Longshoremen's Act. The House Committee Report on the 1949 amendments explained:

> The [House] bill adopts . . . the most frequently used . . . approach [to workmen's compensation for permanent partial disability] which consists of a schedule for such particularized permanent disability and for facial disfigurement, *but with one important modification.* If the injury results in permanent major impairment, such as total loss or loss of use of an arm, hand, leg, foot, or eye, or total loss of hearing in both ears, a scheduled indemnity would, in most cases, be seriously inadequate. To overcome this inadequacy, *an employee suffering such serious injury to a member or function would, upon expiration of the compensation period specified in the special schedule, be protected against continued disability and impairment of his wage-earning capacity at the regular compensation rate applicable to such continued disability like other disabled employees. In*

> *these major injury cases, the schedule of compensation would thus be minimal rather than exhaustive;* . . .

H.R. Rep. No. 729, *supra*, at 7 (emphasis added); *see* 95 Cong. Rec. 8755 (1949) (remarks of Rep. McConnell). The Senate version was to the same effect. *See* S. Rep. No. 836, *supra*, at 17-18.

The Federal Employees Compensation Act as amended in 1949 did not contain an "other cases" provision identical to the one in the Longshoremen's Act, but it did have a provision which operated the same way to cover cases not falling in the schedule. Despite this, Congress plainly assumed that the recovery for claims based on injuries contained in the schedule would be confined to the benefits therein described. Congress recognized that these benefits would not always compensate for lost earning capacity, and further recognized that some *legislative* action was required if claimants suffering *scheduled injuries* were to be eligible for benefits beyond that set out in the schedule. It therefore incorporated "one important modification" in the amendments which represented a departure from the "most frequently used" approach to compensating permanent partial disabilities arising from scheduled injuries. Even with this modification, a claimant must first go to the schedule that conclusively presumes the amount of recovery due him, and only after he receives the scheduled amount can he seek additional compensation.

In 1966 Congress again amended the Federal Employees Compensation Act to extend the modification to encompass claims based on scheduled injuries other than those involving the total loss of a member. Act of September 6, 1966, Pub. L. No. 89-554, 80 Stat. 536. Under this amendment, claimants covered by the statute who, like Cross, suffer the partial loss of use of a member are entitled to the minimum compensation contained in the

schedule and can thereafter recover benefits for continuing lost earning capacity. The history of this amendment exhibits Congress' understanding that absent legislative action the scheduled benefit represented the outward limit on the compensation due an employee whose claim derives from an injury set out in the schedule. For example, the Senate Report observed:

> *Under existing law, certain persons suffering from specified permanent injuries (mostly the loss, or loss of use, of a member) are entitled to receive compensation for a specified number of weeks.* If the employee has suffered a permanent partial loss, or partial loss of use, of the member listed in the schedule, but no other significant impairment of the body, *he receives no further compensation after his scheduled award is exhausted.* On the other hand, if he has received a partial loss or partial loss of use, of a listed member and has also suffered a significant impairment in a part of the body not listed in the schedule, he can be compensated for loss of wage-earning capacity, if any, but not for the scheduled loss. The committee's amendment treats the person with a scheduled partial loss, whether or not accompanied by another disability, as the act now treats persons suffering total loss or total loss of use of a member—*by allowing them the scheduled injury in each case, and by providing for compensation based on loss of wage-earning capacity after the scheduled award has been paid out.*

S. Rep. No. 1285, 89th Cong., 2d Sess. 3 (1966) (emphasis added); *see* H.R. Rep. No. 1304, 89th Cong., 2d Sess. 3 (1966) (to the same effect).

In the most recent amendment of the Federal Employees Compensation Act Congress adopted a formula the effect of which was to extend the benefits of a scheduled award to claimants who would otherwise be compensated under that statute's version of the "other cases" provision. Act of September 7, 1974, Pub. L. No. 93-416, § 4, 88 Stat. 1144. Congress once again indicated its understanding that claimants with injuries specified in the schedule would be confined to compensation described therein absent some explicit provision permitting compensation in addition to the scheduled benefit. *See* H.R. Rep. No. 1025, 93d Cong., 2d Sess. 4 (1974). This is particularly clear in one reference made in the Senate Report. The 1974 amendments permitted the Secretary of Labor to include non-scheduled injuries other than those Congress identified under the new schedule formula. The Senate Committee expressed its understanding that these other injuries would "not include any organ already included within the Act's existing schedule of compensation." S. Rep. No. 1081, 93d Cong., 2d Sess. 5 (1974).

Hence when Congress intended a type of benefit for permanent partial disability set out in a schedule to be only a part of or alternative to other remedies, it has been able to express that intent. The same Senate and House Committees that have jurisdiction over the Federal Employees Compensation Act have jurisdiction over the Longshoremen's Act. *Compare* S. Rep. No. 1081, *supra*, (Federal Employees Compensation Act) *and* H.R. Rep. No. 1025, *supra*, (same) *with* 118 Cong. Rec. 30397 (1972) (Longshoremen's Act) *and* H.R. Rep. No. 1441, *supra*, (same). *See generally Senate Manual*, 95th Cong., 1st Sess. 36-37 (1977); Brown, *Rules of the House of Representatives* 333-34 (1979). A claimant under the Federal Employees Compensation Act can do what Cross effectively seeks to do under the Longshoremen's Act, namely, obtain the benefit of the scheduled payment supplemented by two-thirds of the difference in his lost earning capacity. The difficulty for Cross is that he works for PEPCO, not the federal government, and the Longshoremen's Act, as opposed to the Federal Employees Compensation Act, does not permit him to receive the

compensation he seeks. When Congress intends a different result, it will modify the statute.

VI

As noted, Congress enacted the "other cases" provision fifty-two years ago and has not changed it since. In the over half-century since 1927, no federal court has ever construed section 8(c) to provide two alternative compensation schemes for permanent partial disability claims based on injuries unquestionably confined as a matter of fact to members contained in the schedule. Conversely, every federal court that has considered this issue has either expressly or impliedly held that a claimant's wage-earning capacity is irrelevant when his claim is based on an injury specified in the schedule. This is especially apparent in cases dealing with whether a *lack* of loss of wage-earning capacity deprives the claimant of the scheduled benefit. *See, e.g., Bethlehem Steel Co. v. Cardillo*, 229 F.2d 735 (2d Cir. 1955), *cert. denied*, 351 U.S. 950 (1956); *Travelers Insurance Co. v. Cardillo*, *supra*, at 144; *Gulf Stevedore Corp. v. Hollis*, 298 F. Supp. 426 (S.D. Tex. 1969), *aff'd per curiam*, 427 F.2d 160 (5th Cir.), *cert. denied*, 400 U.S. 831 (1970); *Cox v. American Store Equipment Corp.*, 283 F. Supp. 390 (D. Md. 1968). Because the majority holds that wage-earning capacity can be relevant to a claim based on a scheduled injury, and because nothing in its analysis of the statute logically confines the relevance of wage-earning capacity to situations in which the claimant has actually suffered a loss, the majority effectively overrules the reasoning of this unbroken string of cases.

Two federal cases bearing on the issue here are illustrative. One is *Williams v. Donovan*, 234 F. Supp. 135 (D. La. 1964), *aff'd per curiam* 367 F.2d 825 (5th Cir. 1966), *cert. denied*, 386 U.S. 977 (1967). In that case, the employee injured his knee during the course of his

employment. The testimony indicated that he had sustained a permanent partial loss of use of his leg. Compensation was awarded on the basis of the scheduled benefit. The employer argued that this method of compensation was in error because he was entitled to elect recovery under the "other cases" provision. The court categorically rejected the argument, reasoning on the basis of the statute that "it is evident that when considering compensation in a case of permanent partial disability, the form and language of the Act dictate that the wage-earning capacity test be applied *only in those "other cases" not listed in the schedule.*" *Id.* at 139 (emphasis added).

Williams is on all fours with this case. The majority rejects its reasoning without discussing it, partly on the basis of the brevity with which the Fifth Circuit affirmed it and partly on the basis of an ostensible trend in some other workmen's compensation laws. This trend is discussed below, but concerning the majority's attempt to minimize the case on the basis of the length of the Fifth Circuit's affirmance, it is noteworthy that the use of a brief per curiam to affirm a district court opinion ordinarily indicates that the appellate court is completely in accord with the reasoning of the trial court. Moreover, speculation about the Fifth Circuit's position is unnecessary, for that court had the opportunity to reassess *Williams* as recently as several months ago, and expressly declined to do so. In *Jacksonville Shipyards, Inc. v. Dugger*, 587 F.2d 197 (5th Cir. 1979) (per curiam), the employer argued that because the claimants' injury fell within section 8(c)'s schedule, his compensation was confined to the benefit specified therein. As indicated, this has been the universal rule where compensation for permanent *partial* disability has been in issue. The Fifth Circuit rejected the argument because the claimant had demonstrated his disability was permanent and *total*, a situation which rendered the schedule irrelevant. *Wil-*

liams, the court of appeals said, was "consistent with our holding here" because in that case "the claimant was suffering from a partial disability, resulting from an injury to a specific member." *Id.* at 198. Thus a claimant can always show that his disability is total rather than partial, but if that latter is the case, then his compensation is determined by the schedule if his injury is confined to one of those specified therein.

Another case of note is *Flamm v. Hughes*, 329 F.2d 378 (2d Cir. 1964), in which the plaintiff claimed that section 8 erects "unconstitutional distinctions among various types of injuries in that it provides a specific schedule of compensation for a limited number of weeks for those injuries resulting in permanent partial disability which are explicitly enumerated in that provision but fails to provide for compensation in accordance with such schedules for permanent partial disability resulting from a combination of injuries not explicitly enumerated." *Id.* at 380. The precise issue for the Second Circuit was whether the district court erred in declining to convene a three-judge court to consider the question. The court of appeals affirmed on the ground that the plaintiff had failed to raise a substantial federal question. The claim was without merit because Congress "enjoys great latitude in promulgating a statutory scheme for the compensation of workers" and it did not act irrationally in deciding "to provide a specific schedule of compensation limited to a prescribed number of weeks for enumerated permanent partial disabilities and yet provide compensation for an indefinite period of time for all other injuries leading to permanent partial disability." *Id.* The unarticulated predicate for Judge Lumbard's opinion for the Second Circuit was that the two schemes were mutually exclusive as between each other; otherwise the issue would never have been raised. And the predicate was unarticulated because the language of the statute made the propostion so clear.

VII

Lacking support in the statute, the legislative history, or the case law for its unique interpretation of section 8(c), the majority opts to rely on three general principles often invoked in workmen's compensation cases. In my view this reliance is misplaced.

A

First the majority cautions that the Longshoremen's Act, being a remedial statute, must be construed in light of its humanitarian purposes. It later concludes that its construction of section 8(c) is in accordance with this tenet of statutory construction.

I do not disagree with the general proposition that a remedial statute must be construed with its remedial purposes in mind, though the proposition is itself little more than a restatement of the principle that congressional intent guides the construction of a statute. If Congress intended the statute to provide a remedy, then courts must read the statute to achieve that congressional intent. The principle usually comes into play when the applicability of the statute is in question, that is, when the court must determine whether the statute covers a particular individual or circumstance. *See* 3 C. Sands, *supra*, § 72.05.

In this case we are unconcerned with whether Cross is covered by the statute; everyone agrees that he is. The question is how shall he be compensated. That a court must construe a statute with its remedial purposes in mind does not give a court, as the majority acknowledges, a "license to rewrite this or any other act of Congress." Maj. Op. at 5. Nor does it mean that the language in the statute is to be construed beyond all reason to ensure the claimant the largest conceivable award the statute offers. Rather courts are confined to what the statute

can fairly be read to mean. If there is an element of ambiguity, then perhaps the majority's general proposition can sway a court in the direction of the broader meaning. But using every intrinsic and extrinsic aid to statute construction at a judge's command, I can find no ambiguity. Only by ignoring the language and history of the statute can the court achieve the result it does. This undermines the foundation of the proposition on which the majority relies—that congressional intent governs construction of a statute.

B

Next the majority stresses that "disability" is an "economic concept" rather than a medical one. To the majority this means that wage-earning capacity rather than physical injury governs compensation for disability. Fearful that this analysis might lead to a two-way street through section 8(c)(21) whereby a scheduled injury might go uncompensated if the employer can show no loss of wage-earning capacity, the majority contends that section 8(c)(1)-(20), the schedule, represents "a conclusive congressional determination that certain injuries entitle a claimant to benefit on grounds that he is *injured*, not on grounds that he is actually *disabled*." Maj. Op. at 8 n.28 (emphasis in original). Thus for the majority disability is exclusively an economic concept while at the same time compensation for permanent partial disability based on scheduled injuries is exclusively a medical concept. This is confusion compounded.

Earlier I stated that nothing in the majority's analysis logically confines the relevance of wage-earning capacity to situations in which the claimant who has sustained a scheduled injury actually suffers a loss in earning capacity, *i.e.*, that the majority is creating precisely the two-way street through section 8(c)(21) which it purports to disclaim. This assertion is borne out by examination of the majority's treatment of disability as an "economic concept," for that treatment displays a very basic misunderstanding of the concept of disability and its relationship to the schedule of benefits in the Longshoremen's Act.

Disability is neither exclusively economic nor exclusively medical in character; it draws from both. *See* 2 A. Larson, *The Law of Workmen's Compensation* § 57.10 (1976). To measure all compensation in terms of lost earning capacity would create a disincentive for the medically disabled employee who is able and eager to return to work. To measure all compensation in terms of physical injury would penalize the economically disabled employee who is eager but unable to return to his earlier job. Congress has long recognized the trade-offs involved in fashioning an administratively feasible system of compensation which accommodates both of these interests within reasonable limits. *See, e.g.*, H.R. Rep. No. 729, *supra*, at 7-8; S. Rep. No. 836, *supra*, at 17-18. The system Congress adopted defines disability in terms of wage-earning capacity, *see* 33 U.S.C. § 902(10) (1976), but there are always two facets to a compensable disability: physical injury *and* an inability to earn wages.

The majority's principal error lies in its efforts to reconcile the definition of disability with the existence of a schedule of benefits based solely on physical injury. As noted, confronted with this seemingly disparity, the majority declares that the schedule is designed to compensate for an injury, thus contradicting its insistence on disability as an exclusively economic concept. The disparity the majority fears, however, does not exist, and thus the confusion surrounding its attempts at reconciliation is unnecessary. The existence of scheduled benefits solely based on physical injury is wholly consistent with the definition of disability solely based in economic terms because the purpose of the schedule is to set out *con-*

clusive presumptions on *lost earning capacity* for specified injuries. Professor Larson explains it this way:

> [The immateriality of lost wage earning capacity to determination of scheduled benefits] is not . . . to be interpreted as an erratic deviation from the underlying principle of compensation law—that benefits relate to loss of earning capacity and not to physical injury as such. The basic theory remains the same; the difference is that the effect on earning capacity is a conclusively presumed one, instead of a specifically proved one based on the individual's actual wage-loss experience. . . . To avoid . . . protracted administrative task[s], the apparently cold-blooded system of putting average-price tags on arms, legs, eyes, and fingers has been devised.

2 A. Larson, *supra*, § 58.11.

Hence the schedule of benefits is not only "a conclusive congressional presumption that certain injuries entitle a claimant to benefit on grounds that he is injured," it is a conclusive congressional presumption that the injury creates a disability entitled to the specified amount as compensation. "Congress has determined that a loss of wage-earning capacity *and its extent* are conclusively established when one of the enumerated physical impairments is proven to have arisen out of employment." *Travelers Insurance Co. v. Cardillo, supra*, at 144 (emphasis added). A conclusive presumption cannot be rebutted by any evidence, either of a greater or lesser loss of earning capacity; it is positive law. The majority's view transforms the presumption into one rebuttable by a claimant with evidence of lost earning capacity in excess of the scheduled benefit. Because heretofore the schedule itself represented final congressional judgments on the extent of the loss of earning capacity (rather than the effects of the physical injury), there is no reason why an employer cannot hereafter rebut the presumption of a

scheduled loss with evidence of a lack of lost earning capacity. Hence my conclusion on the two-way street the majority paves through section 8(c)(21).

Confining a claimant who sustains an enumerated injury to the compensation contained in the schedule does no violence to the idea that disability is an economic concept. Instead it neatly accords with that idea. The majority's quarrel essentially is with Congress' determination to establish a conclusive presumption on the amount of wages a claimant has lost by devising a "cold-blooded system of putting average price-tags" on specific body members. Absent questions of constitutional dimension, however, it is not within our power to quarrel with congressional judgments.

C

Finally the majority observes that the current trend in workmen's compensation law leans toward a notion that scheduled benefits are non-exclusive. Relying on state cases and Professor Larson's treatise, the majority concludes that its reading of section 8(c)(21) best accords with this trend.

Assuming for argument that such a trend exists and can be considered by this court, I question whether it has any application to this situation. The examples Professor Larson uses all involve cases in which a claimant with a scheduled injury is found as a matter of fact to suffer either from a permanent total disability or from a permanent partial disability that *extends to other parts of the body*. *See* 2 A. Larson, *supra*, § 58.20 at 10-196. Thus, for example, if a claimant suffers a specified injury which renders him incapable of working at all, this trend favors him recovering for permanent total disability.

This was the situation involved in *American Mutual Insurance Co. v. Jones*, 426 F.2d 1263 (D.C. Cir. 1970),

a case on which the majority relies. The claimant in *Jones* was "a 63-year-old man of limited intelligence whose only past work ha[d] been as a laborer." *Id.* at 1265. He sustained a work-related injury to his hand which resulted in the loss of use of that hand for all but the lightest work. He was unable to find work for several years. The employer argued that because the injury was scheduled, the claimant was confined to compensation under the schedule of benefits for permanent partial disability. The claimant, noting that the statute contained only a partial listing of injuries and provided that [i]n all other cases permanent total disability shall be determined in accordance with the facts," 33 U.S.C. § 908(a), argued that nonmedical evidence was admissible to show that he in fact suffered from a disability permanent in quality and total in character. This court agreed.

The holding in *Jones* is consistent both with the idea of disability as an economic concept and with the express language of the statute relating to permanent total disability. The claimant there was not trying to recover for a heart attack or a hernia when his injury was to his hand; he was arguing that the injury to his hand *totally* disabled him in light of his age, work skills and experience, and ability to obtain employment. In *Jacksonville Shipyards, Inc. v. Dugger*, *supra*, the Fifth Circuit had no difficulty reconciling *Jones*, which it followed, and *Williams*, which held the schedule to be exclusive (in relation to the "other cases" clause) when only a permanent partial disability was involved. Section 8 says that the "facts"—medical and economic—determine permanent total disability; it conclusively presumes compensation for a scheduled injury permanent in quality and partial in character.

It is noteworthy that the two state cases the majority cites, *Van Dorpel v. Haven-Busch Co.*, 350 Mich. 135, 85 N.W.2d 97 (1957), and *American Tank & Steel Corp.*

v. Thomson, 90 N.M. 513, 565 P.2d 1030 (1977), involved the same fact situation as *Jones*. The majority cites no cases applying the nonexclusivity trend to an "other cases" provision in a situation like the one at bar where the only finding of fact is that the injury was confined to the leg. As noted, Professor Larson does not relate the nonexclusivity trend to "other cases" provision. He notes several states which follow the trend, but some of these states have rejected extension of the nonexclusivity trend to other cases. *E.g.*, *compare Jaynes v. Industrial Commission*, 436 P.2d 172 (Ariz. App. 1968) (cited in 2 A. Larson, *supra*, § 58.20) (injury to leg which produces arthritis compensable under "other cases") *and Corbus Spring Service v. Cresswell*, 359 P.2d 219 (Okla. 1961) (cited in 2 A. Larson, *supra*, § 58.20) (injury to leg which extend to back compensable under "other cases") *with LaRue v. Ashton Co.*, 406 P.2d 451 (Ariz. App. 1965) (injury confined to leg compensable only under schedule) *and Thomas Concrete Products v. Robertson*, 485 P.2d 1054 (Okla. 1971) (injury confined to specific scheduled member compensable under schedule only).

Although the majority construes Larson to grant the claimant the advantage in every scheduled injury case, Professor Larson himself understands that the existence of a schedule causes disadvantages in some situations. *See* 2 A. Larson, *supra*, § 58.13 at 10-174. Other treatises directly address the "other cases" situation and render conclusions consistent with the plain meaning of the statute. *See*, *e.g.*, 11 *Schneider's Workmen's Compensation* § 2311 at 493 (3d ed. 1958) ("the ['other cases'] clause refers to a disability resulting from an injury to some portion of the body or usefulness of some physical function not mentioned in the schedule for specific loss or loss of use"); 99 C.J.S. *Workmen's Compensation* § 307 (1958) (an injury specifically covered by the schedule is not compensable under the "other cases" provision). Thus the trend the majority seeks to promote likely is inapposite in this situation.

Assuming for argument the trend has some application here, it is no substitute for legislation. We do not owe our allegiance to the latest fad, but to congressional intent. Thus whatever the current rage may be it supplies no warrant for ignoring the language of the statute. The majority's reasoning vests *new* congressional intent in a statute enacted fifty-two years ago. Congress has indicated that it will undertake efforts to conform workmen's compensation law "to the latest thinking in the area." H.R. Rep. No. 1025, *supra*, at 1; *see* S. Rep. 1081, *supra*, at 1. We should let Congress continue those efforts; we have no choice.

VIII

The facts indicate that Cross sustained an injury to his leg alone. The plain meaning of the statute confines recovery for such an injury to the benefits contained in the schedule. Neither the text of the statute nor its legislative history supports the majority's interpretation of the "other cases" provision. Instead, the legislative history of the Longshoremen's Act and the Federal Employees Compensation Act exhibits Congress' understanding that the "other cases" provision is confined to disabilities based on injuries not mentioned in the schedule. Every federal court that has considered the question has so concluded; no federal court has reasoned otherwise. The idea of "disability" as an economic concept is totally consistent with an interpretation of the statute which is faithful to its plain meaning. Nothing in the tenets of statutory construction or the trends in workmen's compensation law counsels a different construction. It is for Congress to make the policy judgments required to permit Cross to recover for lost wage earning capacity on the basis of an injury for which Congress has conclusively presumed the amount of that loss.

I would vacate the Board's order with directions to compensate Cross under section 8(c)(2), (19).

APPENDIX B

Decision of the Benefits Review Board, Department of Labor

U.S. DEPARTMENT OF LABOR
BENEFITS REVIEW BOARD
Washington, D.C. 20210

BRB No. 77-261

TERRY M. CROSS, JR., *Claimant-Respondent*

v.

POTOMAC ELECTRIC POWER CO., *Employer-Petitioner*

DECISION

Appeal from the Decision and Order of Edwin S. Bernstein, Administrative Law Judge, United States Department of Labor.

Leslie Scherr (Margolis, Davis & Finkelstein), Washington, D.C., for the claimant.

Richard W. Turner (Hamilton & Hamilton), Washington, D.C., for the employer.

Before: Smith, Chairman, Hartman and Miller, Members.

Hartman: Member:

This is an appeal by the employer from a Decision and Order (76-LHCA-144) of Administrative Law Judge Edwin S. Bernstein pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, as amended, 33 U.S.C. § 901 *et seq.*, as extended to the District of Columbia by the District of Columbia Workmen's Compensation Act, 36 D.C. Code § 501 *et seq.* (hereafter referred to as the Act).

Claimant was employed as a cable splicer by employer. In the course of his duties, claimant would life heavy cables and equipment, work on scaffolding 20 to 30 feet high, work in confined areas, and climb in and out of manholes. On December 7, 1974, claimant tore the medial meniscus in his left knee during the course of his employment.

This injury required surgery. Claimant returned to work on March 17, 1975. Since returning to work, he has not performed his former duties. Rather, he has performed light duty, such as taking care of equipment at one of employer's warehouses and "touring" employer's Washington, D.C., service building inspecting trucks and other equipment. Employer has continued to pay claimant as a class A cable splicer. However, he has lost a considerable amount of overtime and several raises because he no longer actively works as a cable splicer.

There was disagreement at the hearing as to whether claimant's medical condition prevented him from returning to his former duties. The administrative law judge concluded that claimant could not at the present time return to those duties because of residuals from his injury. This conclusion is supported by substantial evidence in the record and, therefore, must be accepted by the Board.

The administrative law judge determined that claimant suffered a loss in wage earning capacity under Sections 8(c)(21) and 8(h) of the Act, 33 U.S.C. §§ 908(c)(21), 908(h), as a result of his injury, and benefits were awarded accordingly.

Employer appeals contending that claimant's compensation for the loss of use of his leg should have been limited to a scheduled award under Sections 8(c)(2) and 8(c)(19) of the Act, 33 U.S.C. §§ 908(c)(2), 908(c)(19), based solely on the degree of medical impairment or, alternatively, based on a degree of impairment that took both medical and economic factors into consideration.

The structure of the schedule under the Act, Sections 8(c)(1)-8(c)(19), clearly contemplates a system where a stated number of weeks of compensation shall be paid for the total loss, or total loss of use, of a member. A proportionate number of weeks of compensation shall be paid for a *medically* determined degree of loss of use of a member. The schedule by its nature contemplates an easily

administered system of compensation, where a claimant need not prove a loss in wage-earning capacity. Rather, the loss in wage-earning capacity is presumed without reference to claimant's actual occupation. *Traveler's Ins. Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), *cert. denied*, 350 U.S. 913 (1955).

However, under the Act, the schedule is not exclusive. In keeping with the humanitarian purpose of the Act, if a claimant can prove a loss in wage-earning capacity greater than that provided by the schedule, he may pursue a claim under Section 8(c)(21) or Section 8(a). *See Mason v. Old Dominion Stevedoring Corp.*, 1 BRBS 357, BRB No. 74-182 (March 21, 1975); *Longo v. Universal Terminal & Stevedoring Corp.*, 2 BRBS 357, BRB No. 75-135 (October 16, 1975). Claimant, in this case, sustained an injury that the record indicates caused a loss in wage-earning capacity greater that that for which the schedule would have compensated him, this injury, therefore, warrants a continuing award under Section 8(c)(21). Of course, if at a future date the residuals of the claimant's injury lessen or disappear, employer has the option of seeking modification. A finding of permanent disability at this time does not preclude modification for a subsequent change of condition. *Watson v. Gulf Stevedore Corp.*, 400 F.2d 649 (5th Cir. 1968).

Accordingly, the Decision and Order of the administrative law judge is affirmed.

/s/ Ralph M. Hartman
Ralph M. Hartman, Member

/s/ Samuel J. Smith
Samuel J. Smith, Chairman

/s/ Julius Miller
Julius Miller, Member

We Concur:

Dated this 29th day of November, 1977

SERVICE SHEET

BRB No. 77-261: TERRY M. CROSS, JR. v. POTOMAC ELECTRIC POWER COMPANY (Case No. 76-DCWC-144)

A copy of this Decision was sent to the following parties:

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600 Union Trust Bldg.
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Mr. Everett P. Jennings
Acting Director, Office of Workers' Compensation Programs
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Suite S-3524, NDOL
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APPENDIX C

Decision and Order of the Administrative Law Judge

U.S. Department of Labor
Office of Administrative Law Judges
Suite 700 - 1111 20th Street, N.W.
Washington, D.C. 20036

Case No. 76-DCWC-144

OWCP No. 40-90347

In the Matter of

Terry M. Cross, Jr., *Claimant*

v.

Potomac Electric Power Company, ***Employer***
Self-Insured

Leslie Scherr, Esquire
Margolius, Davis, Finkelstein & Karlin
1120 Connecticut Avenue, N.W.
Washington, D.C. 20036

For the Claimant

Richard W. Turner, Esquire
Hamilton and Hamilton
Union Trust Building
Washington, D.C. 20005

For the Employer

Before: Edwin S. Bernstein
Administrative Law Judge

DECISION AND ORDER

This is a claim for compensation under the District of Columbia Workmen's Compensation Act which embodies the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 et. seq. ("the Act").

Findings of Fact

On December 7, 1974, Claimant sustained an accidental injury which arose out of and occurred in the course of his employment with the Employer. He was paid temporary total disability compensation until March 17, 1975 when he returned to work. The claim is for permanent partial disability. At issue are the degree of Claimant's disability and amount of compensation.

Claimant began working for the Employer as a Cable Splicer Helper in 1961 and by 1972 he had become a Class A Cable Splicer. This job requires the employee to be in top physical condition. A Class A Cable Splicer must climb up and down ladders in connection with working in manholes and on scaffolds; must bend and twist his body as he works in confined areas; must lift heavy cables and heavy equipment; and must twist cables on scaffolds 20 to 30 feet high. It is rugged work.

On December 7, 1974 while working in a manhole, Claimant sustained a torn medial meniscus of the left knee. Following surgery and recuperation, Claimant returned to work on March 17, 1975. He was placed on light duty and has remained on light duty since that time.

Claimant testified that he experiences pain, discomfort, swelling and buckling of his left knee when he is on his legs for a long period of time, as when he goes shopping and contends that he can no longer perform the rigorous work of a Class A Cable Splicer for fear of endangering himself or others such as when he is working on a scaffolding.

Dr. Kent Peterson, the orthopedic surgeon who operated on Claimant, felt that Claimant made a successful recovery and had but a five percent partial disability of the leg. Dr. Robert E. Collins, a board certified orthopedic surgeon found that Claimant had a 20 percent disability of the leg and concluded that Claimant would experience considerable

pain, discomfort, and aggravation to his leg should he attempt to return to his former work.

Conclusions of Law

Claimant has become permanently partially disabled because of the accident. It seems clear to me that he can no longer perform the rigorous work of a Cable Splicer A because of his knee injury. Pursuant to Section 8(c)(21) of the Act, Claimant is entitled to receive compensation based upon the difference between his pre-injury average weekly wages and his post-injury wage earning capacity. The evidence is that although Claimant has been paid as a Class A Cable Splicer A for performing light duty since the accident, he has been denied several salary increases and no longer works overtime because of his disability.

Claimant urges that his 1974 earnings be used to determine his average weekly wages. However, as the Employer correctly points out, Claimant's 1974 earnings were abnormally high because Claimant worked an unusual amount of overtime on subway construction during that year. Thus, it would be unfair to the Employer to utilize only 1974 in determining Claimant's average weekly wage.[1]

The Employer contends that Claimant's 1974 earnings therefore should be disregarded. I disagree. In order to

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[1] The following table shows that Claimant's 1974 earnings as well as those of most other Class A Cable Splicers shown are unusually high compared to the other years.

Employee	1972 Wages	1973 Wages	1974 Wages	1975 Wages
Claimant	$14,655.84	$15,251.53	$21,959.38	$12,086.48
Bond	$15,298.67	$18,388.66	$20,912.28	$17,527.12
Waldron	$13,335.31	$15,557.99	$15,987.57	$17,201.87
Burnside	$13,836.89	$16,275.36	$17,944.41	$16,397.97
Baeigluppi	$13,908.26	$18,630.54	$19,503.16	$18,623.67
Shenk	$13,814.15	$18,256.45	$18,653.51	$17,133.44
McManus	$11,725.60	$12,424.31	$13,430.72	$14,622.39

compensate Claimant for his loss of earnings as a result of the injury, 1974 as well as 1972, 1973 and 1975 earnings must be considered.

At the outset it is evident that because these overtime earnings play such an important role, Section 10(a) and 10(b) of the Act can not be reasonably and fairly applied and Section 10(c) must be utilized.

Several different approaches have been suggested. The one that I find most reasonable and fair is Counsel for Claimant's suggestion that the ratio of overtime to base earnings be average for 1972, 1973 and 1974 and that this average be used to determine Claimant's lost overtime earnings. By use of this method, I find that for 1972, 1973 and 1974 Claimant's average overtime earnings equaled 43.67% of his base earnings.[2]

At Claimant's post-injury rates, it appears that his 1975 straight time earnings would have been $14,263.84 had he worked during the entire year.[3] Claimant was denied base pay increases totalling $.18 per hour because of his injury. On an annual basis, this amounts to $374.40 of lost base pay.

[2] This computation was made as follows:

YEAR	BASE EARNINGS	OVERTIME EARNINGS	PERCENTAGE OVERTIME OF BASE
1972	$10,940.80	$3,715.04	33.96
1973	$11,743.60	$3,507.93	29.87
1974	$13,416.00	$8,543.30	63.68
Totals	$36,100.40	$15,766.27	43.67 (Average)

[3] This sum was arrived at based upon a 40 hour week and hourly rates of $6.53 for 22 weeks from January 1 through May 31; $7.09 for 26 weeks from June 1 through November 29; and $7.16 for 4 weeks from November 30 through December 1, 1975. Claimant's actual 1975 earnings were $12,086.48 because he was disabled and received compensation payments from January 1 through March 17, 1975.

By adding $14,263.84 to $374.40 a total of $14,638.24 is obtained which can be used as a base upon which to apply the overtime factor of 43.67%. This results in $6,392.52 of lost overtime earnings which added to the $374.40 of lost base earnings results in a total of $6,766.92. I find this sum to be Claimant's permanently lost earning capacity as a result of the accident. Divided by 52 weeks, this constitutes $130.13 per week. Claimant is entitled to receive weekly compensation of 66⅔% of this amount or $86.76 per week. In making these determinations and evaluations, I have tried to arrive at a fair and equitable assessment of Claimant's reduced earning capacity. I am convinced that the method adopted accomplishes that objective.[4]

I further find that Leslie Scherr, Esquire, is entitled to receive from the Employer a fee of $3,000.00 for legal services rendered to claimant herein and recovery of expenses totalling $279.30, all which I find to be reasonable. The expenses include a witness fee of $250.00 payable to Dr. Collins.

ORDER

1. The Employer, Potomac Electric Power Company, shall pay to Claimant, Terry M. Cross, Jr., $86.76 per week from March 17, 1975 onward, with interest of 6 percent per annum from the date that each payment was due, together with all of Claimant's reasonable medical expenses.

[4] The future overtime requirements for the subway are unpredictable. Although the Employer alleged that 1974 was vastly disproportionate, it should be noted that the 1975 earnings for the other 6 employees, whose earnings were submitted by the Employer and shown at footnote 1 herein, declined but an average of 4.6% from 1974 to 1975. Had I reduced Claimant's 1974 earnings by this percentage I would have found a loss of earnings of $141.67 per week. However, I believe that the method utilized results in a more realistic assessment.

2. The Employer shall pay $3,279.30 directly to Leslie Scherr, Esquire, for legal services rendered to Claimant and expenses incurred herein.

/s/ Edwin S. Bernstein
Edwin S. Bernstein
Administrative Law Judge

Dated: February 28, 1977
Washington, D.C.

Certificate of Filing and Service

I certify that on March 7, 1977 the foregoing Compensation Order was filed in the Office of the Deputy Commissioner, District of Columbia District Office and a copy thereof was mailed on said date by certified mail to the parties and their representatives at the last known address of each as follows:

Mr. Terry M. Cross, Jr., 7538 Wilhelm Drive, Lanham, Maryland 20801, Claimant
Potomac Electric Power Company
1900 Pennsylvania Avenue, N.W.
Washington, D.C. 20068
Insurance Carrier or Employer (if self-insured)

Leslie Scherr, Esquire, Margolius, Davis, Finkelstein & Karlin, 1120 Connecticut Avenue, N.W., Washington, D.C. 20036

Richard W. Turner, Esquire, Hamilton and Hamilton, Union Trust Building, Washington, D.C. 20005

A copy was also mailed by regular mail to the following:
Judge Edwin S. Bernstein, Office of Administrative Law Judges, U.S. Department of Labor, Washington, D.C. 20210

Associate Solicitor of Labor for Employee Benefits, U.S. Department of Labor, Suite N-2716, NDOL, Washington, D.C. 20210

Director, Office of Workers' Compensation Programs, (LHWCA) U.S. Department of Labor, Washington, D.C. 20211

/s/ Janice V. Bryant
Janice V. Bryant
Deputy Commissioner
40th Compensation District
U.S. Department of Labor
Employment Standards Administration
Office of Workers' Compensation Programs

Form LS-19
Rev. Aug. 1975

APPENDIX D

***Williams v. Donovan*, 234 F.Supp. 135 (E.D.La., 1964)**

CHARLES WILLIAMS, *Plaintiff*,

v.

P. J. DONOVAN, Deputy Commissioner Department of Labor, Bureau of Employee's Compensation of the Seventh Compensation District, *Defendant*, and J. P. Florio & Co., Inc., and American Mutual Liability Ins. Co., *Intervenors*.

Civ. A. No. 13679, Division B.

United States District Court
E. D. Louisiana,
New Orleans Division.

Oct. 1, 1964.

Action against deputy commissioner of department of labor bureau of employees' compensation to set aside a compensation order denying plaintiff an award for total and permanent disability. The District Court, Frank B. Ellis, J., held that evidence permitted deputy commissioner to determine that longshoreman who was injured by falling bale or roll of pulp paper which struck his right leg in area of knee, the cap of which was removed in the course of treatment, was partially permanently disabled to extent of 50% loss of use of right leg and that he was not permanently totally disabled and that wage-earning capacity loss in case of scheduled disability was limited to extent to compensation specified in schedule and court and deputy commissioner were precluded from determining award in any other manner.

Judgment accordingly.

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Frank S. Bruno, New Orleans, La., for plaintiff.

Louis C. LaCour, U.S. Atty., and Gene S. Palmisano, Asst. U.S. Atty., New Orleans, La., for defendant.

Edward P. Jerry, of Merritt & Jerry, New Orleans, La., for intervenors.

FRANK B. ELLIS, District Judge.

On December 15, 1958, the plaintiff, Charles Williams, was employed by J. P. Florio & Company as a stevedore assigned to the loading of the S.S. ARNEDYK as it was moored at the Third Street Wharf on the Mississippi River in New Orleans, Louisiana. While performing his duties in the hold of the vessel, plaintiff was injured by a falling bale or roll of pulp paper that struck him on his right leg in the area of the knee. In due course a formal hearing was held under the provisions of the Longshoremen's and Harbor Workers' Compensation Act [1], 33 U.S.C.A. § 901 et seq., and on July 2, 1963, the Honorable P. J. Donovan, Deputy Commissioner of the Department of Labor, issued a compensation order declaring plaintiff to have incurred a "temporary total disability" as well as a "permanent partial disability," and fixing the total compensation award at $15,706.29 less credits for sums previously paid.

Plaintiff instituted the present action against the Deputy Commissioner under Section 21(b) of the Act [2] seeking to have the compensation order set aside, the findings of the Deputy Commissioner reversed, and a judgment entered holding that plaintiff was rendered "totally and permanently disabled". Upon timely application the interventions of the employer, J. P. Florio & Company, and its compensation insurer, American Mutual Liability Insurance Co., were recognized.[3] The case is before the Court now on motions of all parties for summary judgment.

Defendant and intervenors argue that the findings of the Deputy Commissioner, especially the finding as to permanent partial disability, should not be disturbed since they are supported by substantial evidence on the record considered as a whole. Plaintiff disputes this and urges to the contrary that the same record establishes conclusively that in the legal sense he was totally and permanently disabled. The facts not being controverted, this case is ripe for summary adjudication.

[1] Hereinafter referred to as the Act.

[2] 33 U.S.C.A. § 921(b).

[3] Rule 24(a), Federal Rules of Civil Procedure, 28 U.S.C.A.

In O'Leary v. Brown-Pacific-Maxon, Inc., 340 U.S. 504, 71 S.Ct. 470, 95 L.Ed. 483 (1951), the Supreme Court succinctly stated the rule to be applied by the courts in reviewing administrative agency findings under the Act:

> "The standard, therefore, is that discussed in Universal Camera Corp. v. [National] Labor [Relations] Board ante, p. 474 [71 S.Ct. 456]. It is sufficiently described by saying that the findings are to be accepted unless they are unsupported by substantial evidence on the record considered as a whole." 340 U.S. at 508, 71 S.Ct. at 472.

This test has been consistently followed by the Fifth Circuit Court of Appeals, Miller v. Donovan, 286 F.2d 422 (1961), and by this Court, Gilbert Pacific Inc. v. Donovan, D.C., 198 F.Supp. 297 (1961).

In making his determination the Deputy Commissioner had the benefit of testimony from plaintiff's treating physician and four orthopedic surgeons, all of whom had examined plaintiff. The initial treating physician was Dr. Dabney M. Ewin, a specialist in the field of general surgery. In March of 1959 Dr. Ewin associated Dr. George D. Berkett, an orthopedic surgeon, for consultation, and in August of 1959 Dr. H. R. Soboloff, another orthopedic surgeon, began treating plaintiff. An exploratory knee operation was performed by Dr. Soboloff on February 23, 1960, at which time the articular surface of the cartilage was removed. Approximately one year later Dr. Soboloff also removed plaintiff's knee cap. Further special examinations of plain-

tiff were performed by Dr. Byron M. Unkauf in November, 1961, and by Dr. Santo J. LoCoco in October, 1962.

At the hearing before the Deputy Commissioner each doctor testified as to plaintiff's disability in the medical sense. Dr. Ewin estimated that there would be a "30 percent disability of the right lower extremity" which would still permit plaintiff to perform the duties of a hook-on man or a fork lift driver, but would preclude his employment in the holds of vessels. Dr. Soboloff also determined that plaintiff had "a 30 percent permanent disability of his leg as a result of the injury and the surgery that was necessitated by it", and enumerated other tasks that he felt plaintiff could perform as a stevedore, such as flagman and winch operator. Dr. Berkett's opinion was to the same effect, finding that the patient's "residual disability was in the neighborhood of 35 percent permanent partial disability of the lower right extremity."

Dr. Unkauf's original estimate of plaintiff's disability was "50 percent of the right lower limb", and he added that further suggested treatment could reduce that figure. However, upon seeing the operative reports of Dr. Soboloff, he set the permanent disability "in the neighborhood of 65 percent". Under similar circumstances Dr. LoCoco first determined the permanent disability to be about 45 percent and then revised it to "about a 60 percent permanent disability, and that's putting it small."

Considering the opinions of these expert witnesses and the other evidence presented at the hearing, the Deputy Commissioner translated disability in the medical sense into disability within the meaning of the Act and made a finding that "the claimant has a permanent partial disability equivalent to 50 percent loss of use of his right leg." After weighing the matter this Court cannot say that the Deputy Commissioner's finding is unsupported by substantial evidence on the record considered as a whole, and consequently affirms that finding, especially since appellate

courts have even upheld findings contrary to the weight of the medical testimony. Todd Shipyards Corp. v. Donovan, 300 F.2d 741, 742 (5 Cir. 1962). See Sentilles v. Inter-Caribbean Shipping Corp., 361 U.S. 107, 80 S.Ct. 173, 4 L.Ed.2d 142 (1959). In the instant case the finding is clearly in accord with the weight of the medical testimony. Conversely, the Court rejects plaintiff's contention that he is totally and permanently disabled.

Plaintiff further argues that in determining the amount of compensation due and owing the Deputy Commissioner committed error by applying a wrong provision of the Act. In calculating the award incident to 50 percent permanent partial disability of the right leg, one-half the number of weeks allowable for the loss of a leg under Section 8(c) (2) of the Act [4] was multiplied by the weekly rate. This rate is not in dispute.

Instead, it is contended here that the general wage-earning capacity test defined in Section 8(h) of the Act [5] should have been applied rather than the schedule in Section 8(c). The issue presented then is whether compensation should here be calculated according to the schedule of Section 8(c), or under the provisions of the wage-earning capacity test enunciated in Section 8(h). The Court is of the opinion that the schedule controls and hence also affirms the Deputy Commissioner's method of calculation.

Four subdivisions of Section 8 set forth successively the compensation to be awarded for the respective classes of disability, that is, a) permanent total disability, b) temporary total disability, c) permanent partial disability, and e) temporary partial disability. Under subdivision (c) a compensation schedule is provided enumerating various permanent partial disabilities and assigning to each a cer-

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[4] 33 U.S.C.A. § 908(c) (2).

[5] 33 U.S.C.A. § 908(h). See note 6.

tain number of weeks' compensation to be paid for that disability. In addition, a general catch-all paragraph is included to cover those types of permanent partial disabilities not specified in the other paragraphs:

> "(21) Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his *wage-earning capacity* thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest." (emphasis added)

Thus it is evident that when considering compensation in a case of permanent partial disability, the form and language of the Act dictate that the wage-earning capacity test be applied only in those "other cases" not listed in the schedule. Moreover, since the term "wage-earning capacity" is not otherwise defined in the Act, that definition is provided in Section 8(h) merely as a definition and not as an alternative method of calculating scheduled compensation benefits.[6]

[6] The language of the subdivision bears this out:

> "(h) The wage-earning capacity of an injured employee in cases of partial disability under subdivision (c) (21) of this section or under subdivision (e) of this section shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: *Provided, however,* That if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future."

Plaintiff places reliance upon, and his argument is keyed to, the definition of "disability" in Section 2 of the Act:[7]

> "(10) 'Disability' means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment."

The contention then is urged that an application of the schedule fails to make allowance for the wage-earning capacity loss of a disabled person. However, it has been held, and this Court fully agrees, that in passing the Act

> "Congress has determined that a loss of wage-earning capacity *and its extent* are conclusively established when one of the enumerated physical impairments is proven to have arisen out of the employment." (emphasis supplied) Travelers Insurance Co. v. Cardillo, 225 F.2d 137, 144 (2 Cir. 1955) cert. den. 350 U.S. 913, 76 S.Ct. 196, 100 L.Ed. 800; Bethlehem Steel Corp. v. Cardillo, 229 F.2d 735 (2 Cir. 1956).

This indicates a legislative determination that the wage-earning capacity loss in the case of a scheduled disability shall be limited in extent to the compensation specified in the schedule, precluding this Court and the Deputy Commissioner from determining an award in any other manner. Furthermore, the only cases cited or known by the Court involving an application of the wage-earning capacity test resulted from non-scheduled injuries falling within Section 8(c)(21).[8] Consequently, the motions of defendant and in-

[7] 33 U.S.C.A. § 902.

[8] See, for example, Alexander v. Meiji Kaiun K. K., 195 F.Supp. 831 E.D. La. 1961), affirmed sub nom. Strachan Shipping Co. v. Alexander, 311 F.2d 385 (5 Cir. 1962) [lumbo sacral strain]; Burley Welding Work v. Lawson, 141 F.2d 964 (5 Cir. 1944) [back injury]; Travelers Insurance Co. v. McLellan, 288 F.2d 250 (2 Cir. 1961) [back injury]; Lumber Mutual Casualty & Ins.

tervenors for summary judgment are granted, and plaintiff's motion for summary judgment denied.

Lastly, the attorney for claimant, Frank S. Bruno, was allowed a fee of $300.00 for legal services in connection with prosecution of the claim before the Deputy Commissioner. He has included a prayer here for reasonable attorney fees commensurate with the services reasonably rendered, on grounds that the fee set was not in accordance with law and the evidence in the case. Nowhere does the record indicate that the attorney submitted an application to the Deputy Commissioner supported by a sufficient statement of the extent and character of the necessary work done on behalf of the claimant. This left the Deputy Commissioner clearly within the letter of the pertinent regulation to approve a fee

> "reasonably commensurate with the actual necessary work performed by such representative, taking into account the capacity in which the representative has appeared, the amount of compensation involved, and the circumstances of the claimant." 20 C.F.R. § 31.21.

Not so clear is whether on the facts present in this case the fee is reasonable and in accordance with the test specified in the regulation.

Mr. Bruno has represented claimant as his sole attorney from October 17, 1961, to the present. He prepared for and conducted two days of hearings before the Deputy Commissioner, examining seven witnesses, five of whom were medical experts. Through this attorney's efforts a compensation award exceeding $15,000.00 was secured, and this appeal, albeit unsuccessful, was prosecuted. As to claimant's circumstances, the records of J. P. Florio & Company indicate that plaintiff has been recently earning as much as $400.00 per month. This Court holds that under the test specified in the regulation, in light of the circumstances indicated above, and in accordance with Section 28(a) of the Act[9], the attorney is awarded an additional fee of Five Hundred Dollars ($500.00) for his services.[10]

Co. v. O'Keefe, 217 F.2d 720 (2 Cir. 1954) [back injury]; Twin Harbor Stevedoring & Tug Co. v. Marshall, 130 F.2d 513 (9 Cir. 1939) [neck injury]; and Flores v. Bay Ridge Operating Co., Inc., 131 F.2d 310 (2 Cir. 1942) [back injury].

[9] 33 U.S.C.A. § 928(a).

[10] Radcliff Gravel Co. Inc. v. Henderson, 138 F.2d 549 (5 Cir. 1943); Fidelity & Casualty Co. of New York v. Henderson, 128 F.2d 1019 (5 Cir. 1912).

APPENDIX E

***Williams v. Donovan*, 367 F.2d 825 (5th Cir., 1966)**

CHARLES WILLIAMS, *Appellant*,

v.

P. J. DONOVAN, Deputy Commissioner, Department of Labor, Bureau of Employee's Compensation of the Seventh Compensation District et al., *Appellees*.

No. 22224.

United States Court of Appeals
Fifth Circuit.

Nov. 2, 1966.

Action against deputy commissioner of department of labor, bureau of employee's compensation, to set aside a compensation order denying longshoreman an award for total and permanent disability. The United States District Court for the Eastern District of Louisiana, Frank B. Ellis, J., 234 F.Supp. 135, granted the deputy commissioner's motion for summary judgment and denied longshoreman's motion for summary judgment. The longshoreman appealed. The Court of Appeals held that the record sustained the deputy commissioner's order denying compensation.

Affirmed.

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Frank S. Bruno, New Orleans, La., for appellant.

Edward P. Jerry, Frederick W. Veters, Asst. U.S. Atty., New Orleans, La., Louis C. LaCour, U.S. Atty., for appellee Donovan. Charles Donahue, Sol. of Labor, Alfred H. Myers, George M. Lilly, Attys., U.S. Dept. of Labor, of counsel.

Merrit & Jerry, New Orleans, La., for appellees, Florio and American Mutual Liability Ins. Co.

Before JONES and COLEMAN, Circuit Judges, and CHRISTENBERRY, District Judge.

PER CURIAM:

Although counsel for the appellant strongly urges that this is something more than a review of an award by the Deputy Commissioner in a longshoreman's compensation case by the test of whether the award is supported by the record considered as a whole, it is our conclusion that such is the test which must be applied. The district court had the matter before it on a petition for review. It is the view of this Court that the facts as recited by the district court are correctly stated in its decision and that the principles which it has announced are sound. Williams v. Donovan, D.C.E.D. La.1964, 234 F.Supp. 135. It follows that, applying those principles, the award of the Commissioner and the judgment of the district court should be and are

Affirmed.

APPENDIX F

***Flamm v. Hughes*, 329 F.2d 378 (2nd Cir., 1964)**

MARGARET DONOHUE MULLIN FLAMM, as Executrix of the Last Will and Testament of Charles Flamm, deceased, *Plaintiff-Appellant*,

v.

THOMAS F. HUGHES, Deputy Commissioner, Second Compensation District and Bethlehem Steel Company, Inc., *Defendants-Appellees*.

No. 299, Docket 28297.

United States Court of Appeals
Second Circuit.

Argued Feb. 11, 1964.

Decided March 20, 1964.

Proceeding on application for convocation of a three-judge court to consider claimed unconstitutionality of federal statute. The United States District Court for the Eastern District of New York, Jacob Mishler, J., entered a judgment denying the application and dismissing the complaint, and the plaintiff appealed. The Court of Appeals, Lumbard, Chief Judge, held that claim that section of Longshoremen's and Harbor Workers' Compensation Act providing schedule of compensation for specified injuries is unconstitutional in that it fails to provide compensation in accordance with schedule for permanent partial disability resulting from combination of injuries not explicitly enumerated failed to raise a substantial federal question necessary to convene three-judge court.

Affirmed.

• • • • • • • • • • •

Dora Aberlin, New York City, for plaintiff-appellant.

Edward Berlin, Department of Justice, Washington, D.C. (John W. Douglas, Asst. Atty. Gen., Sherman L. Cohn,

Dept. of Justice, Washington, D.C., and Joseph P. Hoey, U.S. Atty. for Eastern Dist. of New York, Brooklyin, N.Y., on the brief), for defendant-appellee Thomas F. Hughes.

Leonard J. Linden, New York City (Theodore H. Goding, New York City, on the brief), for defendant-appellee Bethlehem Steel Co., Inc.

Before LOMBARD, Chief Judge, and WATERMAN and FRIENDLY, Circuit Judges.

LUMBARD, Chief Judge:

On March 30, 1950, while in the employ of the Bethlehem Steel Company, Charles Flamm sustained personal injuries when a ladder which he was descending gave way. On July 20, 1951, pursuant to the provisions of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. § 901 et seq., Deputy Commissioner Willard found that, from March 31, 1950 to January 30, 1951, Flamm had suffered a temporary total disability, as the result of a back injury, and a 30% permanent partial disability of the left foot.

In two suits brought in the Eastern District of New York, Flamm sought unsuccessfully to challenge the determination of the Deputy Commissioner. A third suit in the Eastern District was stayed in 1960 pending further proceedings before Deputy Commissioner Hughes. On October 6, 1961, following further hearings, Deputy Commissioner Hughes modified the 1951 compensation award to provide temporary total disability from March 31, 1950 to January 31, 1952, and permanent partial disability from February 1, 1952 to April 22, 1961. Meanwhile Flamm had died on April 23, 1961. The 1951 award of permanent partial disability, predicated upon partial loss of one leg, was limited under 33 U.S.C. § 908(c) to a prescribed number of weeks. The 1961 award of permanent partial disability, however, predicated upon a combination of infirmities not specifically enumerated in § 908(c), was limited to the remainder of Flamm's life.[1]

Upon payment of the 1961 compensation award, the district court action was dismissed. In March, 1962 Mrs. Flamm, as executrix of her husband's estate, requested the Deputy Commissioner to reconsider his decision. When that request was not acted upon, she instituted this action in the Eastern District, charging that § 908 of the Compensation Act is "discriminatory, void and unconstitutional in that it denies to injured workmen the equal protection of the laws

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[1] Secton 908(c) provides, in pertinent part:

"Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) or subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:

"(1) Arm lost, three hundred and twelve weeks' compensation.

"(2) Leg lost, two hundred and eighty-eight weeks' compensation.

"(3) Hand lost, two hundred and forty-four weeks compensation.

"(4) Foot lost, two hundred and five weeks' compensation.

• • •

"(19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.

• • •

"(21) Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability, but subject to reconsideration of the degree of such impairment by the deputy commissioner on his own motion or upon application of any party in interest."

and discriminates unfairly against more seriously injured workmen," and requesting the convocation of a three-judge court to enjoin enforcement of that provision. 28 U.S.C. §§ 2282, 2284. Judge Mishler denied that application and dismissed the complaint and from that action Mrs. Flamm appeals.

The plaintiff's claim in essence is that § 908(c) erects unconstitutional distinctions among various types of injuries in that it provides a specific schedule of compensation for a limited number of weeks for those injuries resulting in permanent partial disability which are explicitly enumerated in that provision but fails to provide for compensation in accordance with such schedules for permanent partial disability resulting from a combination of injuries not explicitly enumerated. The primary issue here presented is whether this claim raises a substantial federal question; "[t]he lack of substantiality in a federal question may appear either because it is obviously without merit or because its unsoundness so clearly results from the previous decisions of this [Supreme] Court as to foreclose the subject." California Water Service Co. v. City of Redding, 304 U.S. 252, 58 S.Ct. 865, 82 L.Ed. 1323 (1938). As the claim is obviously without merit, as manifested by a decision of the Supreme Court, we hold that the plaintiff's claim fails to raise a substantial federal question.

Congress enjoys great latitude in promulgating a statutory scheme for the compensation of workers who may suffer a broad range of injuries in terms of duration and severity. That one may receive greater compensation in certain circumstances for temporary disability than for permanent disability does not lead to the conclusion that the statutory scheme is irrational, for one may not equate the duration of an injury with its severity. Nor is it irrational for Congress to provide a specific schedule of compensation limited to a prescribed number of weeks for enumerated permanent partial disabilities and yet provide compensa-

APPENDIX G

Extracts From Testimony Before Administrative Law Judge

APPENDIX G

Extracts From Testimony Before Administrative Law Judge

[2-29] Q. So you worked as a cable splicer from a helper to a class A for 15 years. Can you describe the duties, the physical activities, the job of the cable splicer for PEPCO?

A. Yes, sir. Do all kinds of different splicing [2-30] and difference of all these cables, to a lot of climbing in and out of man holes, up and down ladders, a lot of twisting and turning in all kinds of positions.

You sometimes work in very hazardous conditions in mud, water, different things. You work hot cables under hazardous conditions. Sometimet you even have to squat, a famous squat position and work from that squat position, which I can't do at this time, at all.

You sometimes work on scaffolds, got to climb steel structures and scaffolds up there. And you've got to lift a lot of heavy cables, rack cable, pool cable, lift a lot of heavy equipment, nitrogen cylinders, propane gas bottles, water pumps, blowers, switch boxes, heavy switch boxes, and fuse boxes, climbing different types of heavy equipment.

Q. Did the physical activitiy you described require you to do in your physical condition?

A. Yes, sir, I'd say——

Q. Did you testify that you worked in sewers——

A. They are called manholes.

Q. In New York we used to call them sewers.

A. Right, right. And Art Carney calls them sewers.

Q. Okay, and how do you get up and down into the manholes?

[2-31] A. You always climb wires, of steel—usually steel ladders, sometimes the hole doesn't have a ladder in it already, we have ladders on the trucks and we put the ladders on.

Q. You also mentioned that you had to work on scaffolding, heavy scaffolding.

A. You've got to climb up ladders or off the structure sometimes to get to the scaffolding.

Q. I would ask you, while we're on the subject, you feel confident to climb up on scaffolding in the condition that it is now?

A. No, sir, I do not. My knees buckle on me.

Q. How high is some of the scaffolding that you must climb?

A. Say 20 to 30 feet.

Q. Thirty feet would be two stories.

A. Roughly. As high as I've ever been. There might be certain jobs you might have to go higher.

Q. Are there any other duties of the cable splicer that you haven't described that involve some physical activity?

A. Well, all cable splicing requires a lot of physical activity as far as I know, a lot of different positions you have to get in. I don't know, I just—all of it's tough, rugged work.

• • • • • • • • • • •

[2-39] Q. Would you have confidence that your knee in your current condition and how it's been for the last almost two years, would you have confidence working on scaffolding 30 feet up off the ground?

• • • • • • • • • • •

[2-96] Q. Doctor, do you know what the physical duties and functions of the cable splicer are?

A. I know what, in part what he does.

Q. If we can assume that the duties and activities of the cable splicer are on the average of 15 times a day climbing up and down manholes on those iron ladders, moved ladders, occasionally climbing up the scaffold, up the scaffolding for the—not a ladder, I guess, it would be the structural part to the scaffolding, working in an area on scaffolding which is four feet wide, bending, twisting in mud, and carrying and manipulating heavy cables.

Would these things have, that kind of work, would you say that a person with the kind of injury that you found in this case, and the kind of disability you [2-97] found in this case, would be fully capable of doing that kind of work?

A. No.

Q. Can you explain why.

A. Well, the chondromalacia we talked about came with motion with patella with—we know that with climbing ladders, stairs, that the force on the patella against the bone is four times what is regular walking. This is what causes the pain.

You can predict atrophy if he is going to have pain when he's climbing or when he's kneeling because this increases the force on the weight bearing point of the patella, the chondromalacia part.

And this will aggravate it. This is also when he did exercises. Weight lifting aggravated his knee also.

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No. 79-816

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

POTOMAC ELECTRIC POWER COMPANY,

Petitioner,

v.

DIRECTOR, OFFICE OF WORKERS' COMPENSATION PROGRAMS, UNITED STATES DEPARTMENT OF LABOR

AND

TERRY M. CROSS, JR.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF OF RESPONDENT TERRY M. CROSS, JR.

Petition for Certiorari Filed November 23, 1979
Certiorari Granted February 19, 1980

QUESTION PRESENTED FOR REVIEW

Whether an employee covered by the provisions of the Longshoremen's and Harborworkers' Compensation Act, 33 U.S.C. § 901, *et seq.*, who suffers a permanent partial disability due to an injury to his knee, and such injury causes him to incur a loss of wage earning capacity

greater than the benefits he would receive under the "scheduled loss provisions" set forth in 33 U.S.C. §§ 908(c)(2), (19), is entitled to compensation based on that loss of wage earning capacity pursuant to 33 U.S.C. § 908(c)(21)?

OPINIONS DELIVERED BY THE COURTS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit is reported at 196 U.S. App. D.C. 417, 606 F.2d 1324 (1979). The decision of the Benefits Review Board of the Department of Labor is reported at 7 B.R.B.S. 10. The opinion and order of the Administrative Law Judge of the Office of Workers' Compensation is not reported.

STATEMENT OF THE CASE

On December 7, 1974, while working in a manhole, Terry M. Cross, Jr. ("Cross") sustained an accidental injury to his left knee. Cross, an employee of the Potomac Electric Power Company ("PEPCO") since 1961, had been working as a Class A Cable Splicer for more than two years. The December 7, 1974 injury resulted in a torn medical meniscus which required surgery to remove the cartilage. (J.A. 46(a)-47(a)).

After Cross' surgery, he was placed on a light duty status by PEPCO's doctors and, while he retained the job classification of a Class A Cable Splicer, he was and is unable to perform the rugged, demanding, and strenuous work which that position requires. For that reason, PEPCO denied Cross pay raises and Cross has been unable to work overtime, thereby losing considerable income. (J.A. 46(a)-47(a)). According to the unchallenged finding of the Administrative Law Judge below, Cross

has incurred a lost wage earning capacity of $6,766.92 per year, or $130.10 per week, as a direct result of his on the job injury. (J.A. 49(a)).

PEPCO has taken the position that since Cross' injury was limited to his knee, any benefits to which he might be entitled would be limited to the formula established by 33 U.S.C. §§ 908(c)(2) and (19). Using the medical testimony presented at the hearing, Cross suffered somewhere between a 5 percent and a 20 percent loss of the use of his left leg. Therefore, his total compensation would be limited to an amount between $3,191.97 and $12,773.38 (Brief of Petitioner at 9). In light of the findings of the Administrative Law Judge that Cross has suffered a wage earning loss equal to $130.10 per week, PEPCO's proposal would compensate Cross for from as little as six months' lost wages to, at most, less than two years' lost wages.

The Administrative Law Judge rejected PEPCO's argument and found that Cross could receive his compensation under the provision of section 8(c)(21) of the Act, 33 U.S.C. § 908(c)(21), based on his loss of wage earning capacity. His decision recognized that while the scheduled loss provisions found in section 8(c)(1)-(20), 33 U.S.C. §§ 308(c)(1)-(20), provided a minimum level of compensation for employees who suffered anatomical injuries, they did not bar an employee from receiving compensation based on his lost wage earning capacity. (J.A. 47(a)-50(a).) That decision was affirmed by the Benefits Review Board and by a divided panel of the United States Court of Appeals for the District of Columbia Circuit.

SUMMARY OF ARGUMENT

Section 8(c) of the Act provides for the payment of benefits for employees who suffer permanent partial disabilities. That section provides for two basic methods of compensation of benefits for such disabilities: (1) payment of two-thirds of a specified number of weeks' wages as set forth in the statute and tied to certain injuries (§§ 8(c)(1)-(20)), and (2) compensation based on two-thirds of the loss of earning capacity that the employee suffers as a result of his injury (§ 8(c)(21)). The case law and legislative history reflect that the first method, referred to as the scheduled loss benefits, was designed to compensate employees for the permanent physical loss which they incurred regardless of whether the injury caused any permanent economic loss. The second method of compensation, known as the "other cases" provision, compensates employees who incur a "disability," as a result of his injury. Since the economic loss suffered by Cross constitutes a disability under section 2(10) of the Act, he is entitled to elect to receive his compensation under section 8(c)(21) and to receive compensation for his loss of wage earning capacity.

The Petitioner's argument that the scheduled benefits provisions are mandatory for an employee who suffers an injury to a portion of his anatomy which is contained in the scheduled loss provisions and therefore bar an employee with a disproportionate wage earning loss from receiving compensation for that loss misreads and misinterprets both the Act and Congress' motivation for inserting the scheduled benefits provision. Congress designed the scheduled benefits to create a minimum benefit for an employee who suffers an anatomical loss due to a job related injury. Those provisions were never

intended to supplant the basic concept that disability must be viewed by its economic effect on the worker; rather, the schedules were added to supplement and expand that view. The Petitioner desires to interpret and apply a humanitarian and supplemental benefit program in such a way as to leave Respondent Cross grossly undercompensated for that very economic loss that Congress intended to compensate. Neither the statute, Congressional history nor the case law support such a view.

ARGUMENT

I.

THE PURPOSES OF THE ACT

The Longshoremen's and Harborworkers' Compensation Act [hereinafter referred to as the "Act"], 33 U.S.C. § 901, *et seq.*, (1976)[1] is designed to provide injured employees compensation for the losses they might suffer as a result of industrial or "on the job" injuries. As this Court noted in *Baltimore & Philadelphia Steamboat Co. v. Norton*, 284 U.S. 408, 414 (1932):

> The measure before us * * * requires employers to make payments for the relief of employees and their dependents who sustain loss as a result of personal injuries and deaths occurring in the course of their work whether with or without fault attributable to employers. Such laws operate to relieve persons suffering such misfortunes of a part of the burden and to distribute it to the industries and mediately to those served by them. They are deemed to be in the public interest and should be construed liberally in furtherance of the purpose for which they were

[1] The Act is made applicable to employees within the District of Columbia by D.C. Code § 36-501 (1973).

enacted and, if possible, so as to avoid incongruous or harsh results. * * *

To this end, the primary focus of the Act has been to tie the concept of disability to the economic loss which accompanies an injury. The basic purpose of the Act is not to compensate an employee for his pain or the fact of his injury; rather it is designed to restore to him some of the wages and the medical expenses which the injury would otherwise require him to incur. Section 2(10)[2] defines "disability" as the "incapacity because of an injury to earn the wages which the employee was receiving at the time of the injury in the same or other employment." Accordingly, it has been uniformly held that disability is an economic concept and not a medical concept. *American Mutual Insurance Company of Boston v. Jones*, 138 U.S. App. D.C. 269, 271, 426 F.2d 1263, 1265 (1970); *Haughton Elevator Company v. Lewis*, 572 F.2d 447 (4th Cir. 1978).

In interpreting the Act, this Court has required that it be construed liberally so as to accomplish its purposes and to avoid harsh results. *Baltimore & Philadelphia Co. v. Norton, supra; Voris v. Eikel*, 346 U.S. 328, 333 (1953). In order to read the statute in the manner proposed by PEPCO, this Court would have to ignore the basic purpose of the Act and thereby leave Cross grossly undercompensated for his economic loss.

[2] 33 U.S.C. § 902 (10) (1976).

II.

STATUTORY SCHEME

A. All Categories Of Disability Are Intended To Compensate The Employee For His Loss Of Wage Earning Capacity.

Under section 8 of the Act,[3] an injured employee may be eligible for compensation under four different categories of disability. Section 8(a) provides for compensation in the event of permanent total disability. The measure of compensation is based on 66-2/3 percentum of the employee's weekly wage during the length of the disability. Section 8(b) provides for compensation due to temporary total disability and, again, the measure of compensation is based on 66-2/3 percentum of the employee's weekly wages during the length of the disability. Compensation for temporary partial disability is provided in section 8(e) which, also, calculates the benefit based on two-thirds of the difference between the employee's average weekly wages before the injury and his earning capacity after the injury for the length of the disability, not to exceed five years.

The final category of disability is found in section 8(c) and is the provision at issue. Section 8(c) provides for compensation to an employee who has suffered a permanent partial disability. However, that section establishes two different formulas for the calculation of benefits. Subsection (c)(21), the so-called "other cases" provision, provides for benefits in the same manner as is provided in the other forms of disability, i.e., compensation based on two-thirds of the loss of earning capacity

[3] 33 U.S.C. § 908, (1976).

suffered by the employee as a result of the injury. Section 8(c) also provides for compensation for specially listed injuries calculated on the basis of a specified number of weeks' wages for each listed injury. For instance, section 8(c)(2) reads, "leg lost, two hundred and forty-four weeks' compensation." Finally, section 8(c)(19) provides that for a partial loss of one of the anatomical members set forth in subsections (c)(1)-(17), the employee may receive compensation under the schedule proportionate to the degree of impairment.

The scheduled loss provisions set forth in section 8(c)(1)-(20) are the only provisions in the Act which deviate from the general concept that compensation should be based on lost earning capacity and from the specific definition of disability contained in section 2(10), which explicitly ties the concept of disability to the economic effect of the injury.

This special system of benefits through the scheduled loss provisions is based on a recognition that often an employee may lose all or part of an anatomical member but would have no economic loss beyond that compensated under the temporary disability provisions. The scheduled loss provisions provide an injured employee who has suffered the loss of a member a minimum compensation benefit, based not on the economic effect of the loss, but on the physical loss itself. Neither the statutory scheme, the intent of Congress, nor the existing case law support PEPCO's contention that the scheduled loss provisions were intended to penalize or limit the compensation of an employee who suffers a loss of wage earning capacity greatly disproportionate to the limited scheduled benefits.

B. The Legislative History Reflects Congress' Desire To Provide A Floor Of Compensation For Anatomical Losses, Not A Ceiling.

The Longshoremen's and Harborworkers' Compensation Act was originally enacted in 1927. Act of March 4, 1927, Pub. L. No. 803, Ch. 509, 44 Stat. 1427 (current version at 33 U.S.C. § 901 *et. seq.* (1976)). At that time, the Act established the basic provisions for compensation, including section 8(c). Those provisions have remained basically unchanged since 1927.

The legislative history as to Congress' motivation in deviating from the concept of loss of wage earning capacity when it established the scheduled loss provisions is unclear at best. However, the circumstances surrounding the insertion of the scheduled loss provisions reflect that Congress intended to create a benefit floor rather than limit the employee's right to compensation for his economic loss.

In 1926, the Senate considered and adopted S. 3170. That bill as reported by the Committee treated permanent partial disability in the same manner as it treated all other classes of disability. It provided that the compensation benefit provisions of the Federal Employees' Compensation Act, Act of September 7, 1916, Pub. L. No. 267, Ch. 258, 39 Stat. 743, 5 U.S.C. § 750 *et seq.* (1926 Ed.), would be applied to employees covered by the Act. Those provisions provided an employee with a permanent partial disability two-thirds of the difference between his pre-injury income and his post-injury wage earning capacity. In effect, all employees with permanent partial disabilities would receive benefits in the same manner as is currently contained in section 8(c)(21). S. Rep. No. 973, 69th Cong., 1st Sess. 2-3 (1926); 67

CONG. REC. 10614 (1926) (Remarks of Sen. Walsh). The flaw in this approach was that it failed to provide compensation to an employee who suffered loss to an anatomical member if that loss was not accompanied by a decrease in earning capacity.

When the House considered S. 3170, it amended the benefit provisions to insert a minimum schedule of benefits for the employee who suffers such an anatomical loss but does not suffer a loss of wage earning capacity. The House then retained the basic feature of the Senate version by adopting section 8(c)(21), which provides for compensation for loss of wage earning capacity in "all other cases". H.R. Rep. No. 1767, 69th Cong., 2d Sess. 4 (1927).

C. Subsequent Amendments

While the Act has been amended a number of times, as pointed out above, the basic compensation scheme has remained basically intact since 1927. There have been certain references to and discussions of section 8(c), however, which indicate that when Congress inserted the scheduled benefit provisions it merely attempted to insure that an employee who suffered an anatomical loss would receive some compensation for that loss, even if the loss did not affect his wage earning capacity.

1. *1938 Amendments*

In 1938, the Act was amended by H.R. 5690 which clarified the term "wage earning capacity." Longshoremen's and Harborworkers' Compensation Act Amendments of June 25, 1938, Ch. 685, § 2, 52 Stat. 1165. The purpose of the amendment was to eliminate needless litigation over the precise meaning of the term "loss

of earning capacity." The amendment was designed to allow the initial factfinder to consider a number of factors other than the employee's prior work history in determining his actual loss of wage earning capacity. H.R. Rep. No. 1945, 75th Cong., 3d Sess. 5-6 (1938).

2. *1948 Amendments*

While the 1948 amendments simply adjusted the number of weeks contained in the schedule, both the House and the Senate noted that the basic purpose for scheduled benefits was not to reflect loss of income, but to indemnify an employee for his physical loss:

> Such compensation [scheduled benefits] is in the nature of an indemnity to be paid to an employee who has suffered such an injury and has always been intended to be separate from and in addition to other compensation to which such employee may be entitled to by reason of a temporary total disability or temporary partial disability immediately following his injury.

H.R. Rep. No. 2095, 80th Cong., 2d Sess. 4 (1948). Similarly, the Senate report also referred to the scheduled loss provisions as an "indemnity." "The committee proposes the new indemnity rates as in the nature of a compensatory feature." S. Rep. No. 1315, 80th Cong., 2d Sess. 3 (1948).

3. *1956 Amendments*

Congress again amended the Act in 1956 to adjust the number of weeks in the schedule. The legislative history surrounding those amendments clearly reflects that the scheduled benefits were intended to establish minimum benefits for the fact of injury and not to preclude an

employee from being compensated for his greater loss of earning capacity. The House Committee on Education and Labor stated:

> Section 2 of the bill amends the schedule for compensation in section 8(c) of the Longshoremen's Act, applicable to cases where the disability consists of an anatomical loss, such as an eye, hand, leg, foot, etc. The bill restores the scheduled number of weeks' compensation for the specified disabilities to the same level as they existed in 1927 when the bill was first enacted. As thus restored they will be the same as those in the like schedule in the Federal Employees' Compensation Act. When amending the act in 1934 to remove the limit upon compensation payable for arbitrarily set healing periods (related by the statute to specific anatomical injuries), the then schedule in section 8(c) was reduced in each category by the arbitrary healing period applied.
>
> In thus reducing the scheduled period for anatomical injury, the monetary value of the loss was reduced by a factor which bore no relation to compensation for permanent partial disability. The committee believes this inequitable effect should be corrected by restoring the schedule to its original levels.

H.R. Rep. No. 2067, 84th Cong., 2d Sess. 4 (1956).

4. *1972 Amendments*

In 1972 it was proposed that section 8(c) be amended to add a provision which would allow an employee who suffers a loss of a member to receive benefits under the scheduled loss provisions (section 8(c)(1)-(19)), and, if he has also incurred a loss of earning capacity, to receive benefits based solely on that lost capacity at the expiration of the scheduled loss benefits. PEPCO attempts to present the rejection of that amendment as a Congressional rejection to the holding of the court below. Such a position is untenable. The Petitioner's argument ignores the fact that the amendment went far beyond anything suggested by either Respondents or the decisions below. The 1972 amendment would have created a dual cumulative system of benefits, first the employee would receive all of the scheduled loss benefits available under the statute (66-2/3 percentum of his average weekly wage for a specified number of weeks), and when those benefits are exhausted, he would then receive compensation based on his loss of earning capaicty (66-2/3 percentum of the difference between his pre-injury weekly wage and his post-injury earning capacity).

While this differential in Respondent Cross' case is not as dramatic as it might be in those cases where the percentage of the loss of use of the member would be significantly higher, the case at bar does reveal the fundamental distinction between Respondent's position and the proposed amendment. Under the current statute, as Respondents read it, Cross is entitled to $86.76 per week for the length of his disability.[4] However, under the proposed amendment, Cross would have been eligible to receive $221.65 per week for the first 57.6 weeks of permanent disability (after the expiration of any temporary benefits to which he might be entitled.)[5] Thus for approximately the first year and a month, under the proposed amendment, Cross would have received $7,769.66 more than he would receive under the current

[4] 66-2/3 percentum of his loss of wage earning capacity ($130.13) equals $86.76.

[5] 66-2/3 percentum of Cross' average weekly salary ($332.48) equals $221.66. That amount is then paid over 20 percent of 288 weeks (57.6 weeks).

decision. It is clear that the rejection of an additional benefit was not a Congressional rejection of a system of alternative benefits. Congress adopted the scheduled benefits in 1927, to insure than an employee who lost a member or who suffered disfigurement would receive some compensation for that loss even if he did not incur a loss of wage earning capacity. There is no indication that Congress ever intended to allow an employee to receive both indemnification for the physical loss and then compensation for the economic loss.

Despite PEPCO's extensive analysis of the testimony of witnesses before various committees (Brief of Petitioner at 14-23), nowhere does it cite any indication that Congress intended and believed that the scheduled benefits were exclusive and controlling over the benefits under section 8(c)(21). The comments of Representative Daniels (Brief of Petitioner at 15-6), the only Congressional statements on which Petitioner relies, clearly advocate the cumulative benefits the amendment would have provided, but do not indicate that under the current law the schedule bars the employee's reliance on alternate benefit provisions. Indeed, in light of the remedial purposes of the statute and the uninterrupted interpretation that disability is an economic concept, Congress' rejection of the 1972 amendment was wholly in keeping with the realization that the scheduled benefits were designed to indemnify an employee for the loss of a member but that they were not intended to foreclose him from receiving compensation for his greater real economic loss.

III.

THE CASE LAW SUPPORTS RESPONDENTS' POSITION

A. Cross Is Not Limited To Scheduled Benefits After He Establishes A Greater Loss In Wage Earning Capacity.

The primary concern and thrust of the inclusion of the scheduled benefits in section 8(c) were to insure that an employee who incurred the physical lost of a member (or the loss of the use of the member) without a concomitant economic loss would still receive some compensation for that loss. ". . . [I]n effect, the claimant is being compensated for the loss of the body member, not lost earning capacity." *Gulf Stevedore Corp. v. Hollins*, 298 F. Supp. 426, 431 (S.D. Tex. 1969), *aff'd* 477 F.2d 160 (5th Cir. 1970), *cert. denied* 400 U.S. 831 (1970).

It is now well established that the scheduled benefits were never intended to foreclose the employee from receiving higher benefits to which he may be entitled under other provisions of the Act. In *American Mutual Insurance Company of Boston v. Jones*, 138 U.S. App. D.C. 269, 426 F.2d 1263 (1970), the court held that an employee who suffered a physical injury which would be compensable under the scheduled benefit provisions was not barred from receiving permanent total disability benefits. The court recognized, "The degree of 'disability' in any case cannot be measured by physical condition alone, but there must be taken into consideration the injured man's age, his industrial history, and the availability of that type of work which he can do." *Id.*, 138 U.S. App. D.C. at 271. *Accord, Bath Iron Works Corp. v. White*, 584 F.2d 568, 574 (1st Cir. 1978); *Haughton Elevator Co. v. Lewis*, 572 F.2d 447 (4th Cir. 1978);

Norfolk, Baltimore & Carolina Line, Inc. v. Bergenson, 351 F. Supp. 348 (D.S.C. 1972).

Similarly, the courts have recognized that where an injury to a scheduled member impairs the body as a whole, or some other nonscheduled portion of the body, the measure of the employee's benefits is either the scheduled loss or, if such benefit be insufficient to compensate him for his loss of wage earning capacity, two-thirds of that lost capacity. *Jaynes v. Industrial Commission*, 7 Ariz. App. 78 (1968); *Illinois Exploration v. Ashley*, 430 S.W. 2d 330 (Ky. 1968). As Professor Larson stated:

> Although it is difficult to speak in terms of a majority rule on this point, because of significant differences in statutory background, it can be said that at one time the doctrine of exclusiveness of schedule allowances did dominate the field. But in recent years there has developed such a strong trend in the opposite direction one might now, with equal justification, say that the field is dominated by the veiw that schedule allowances should not be deemed exclusive, whether the issue is treatment of a smaller member as a percentage loss of a larger, or treatment of any scheduled loss as a partial or total disability of the body as a whole.

2 Larson, *The Law of Workmen's Compensation*, § 58.20, pp. 10-212–10-214 (1974).

Following this trend, the Benefits Review Board of the Department of Labor[6] has focused on the effect an injury or loss has on the employee as a whole. This

[6]The Benefits Review Board replaced the United States District Court as the initial review tribunal pursuant to the Longshoremen's and Harborworkers' Compensation Act Amendments of 1972 § 15, Pub. L. No. 92-576, 86 Stat. 1251, 1261 (1972).

examination is based on the underlying premises that disability is an economic concept and not a medical concept (*American Mutual Insurance Company v. Jones, supra*) and that disability must be viewed, not merely in light of the nature of the injury to the member, but in light of the economic effect that injury has on the employee as a whole.

In *Mason v. Old Dominion Stevedoring Corporation*, 1 BRBS 257, BRB No. 74-182 (1975), the employee was a longshoreman who injured his left wrist in an on-the-job accident. While he was unable to return to work as a longshoreman as a result of his injury, he was not totally disabled under the Act. The employee had been able to scrape out a meager living as a watermelon and fish street vendor. Had he not applied himself and sought out some means of employemnt, it is clear that the schedudled injury would have had the economic effect of rendering the employee totally disabled under the *American Mutual Insurance Company of Boston v. Jones* doctrine. The Board found, in light of this Court's mandate that the Act be interpreted liberally and, if possible, so as to avoid incongruous or harsh results (*Voris v. Eikel*, 346 U.S. 328, 333 (1953)), and the recognition that disability must be measured in light of the claimant's age, education, industrial history and the availability of employment, that the employee suffered a permanent partial disability to his body as an economic functioning unit and was entitled to receive benefits under section 8(c)(21), based on his economic loss. As the Board noted, "To limit a claimant, who is unable to return to the duties of his former occupation, to compensation pursuant to a schedule under section 8(c) of the Act would have the effect of dissuading efforts on the part of

an injured claimant to rehabilitate himself." *Id.; Collins v. Todd Shipyards Corp.*, 9 BRBS 1015, 1021 (1979).

B. The Cases Relied Upon By Petitioner Are Inapposite.

It is extremely rare for an employee who suffers an injury to an anatomical member to seek compensation under section 8(c)(21). In the vast majority of the cases where such an injury occurs, the issues are either whether the employee is totally disabled, e.g., *American Insurance Company of Boston v. Jones, supra,* or whether the employee is entitled to compensation under the scheduled loss provisions even though he did not suffer a loss of wage earning capacity. Most of the cases on which PEPCO relies involve the second issue. The issue at bar has only come before the federal courts on two occasions, the instant case and *Williams v. Donovan*, 234 F. Supp. 135 (E.D. La. 1964), *aff'd* 367 F.2d 825 (5th Cir. 1966), *cert. denied* 386 U.S. 97 (1967).[7]

In *Bethlehem Steel Co. v. Cardillo*, 229 F.2d 735 (2d Cir. 1956); *Cox v. American Store Equipment Corp.*, 283 F. Supp. 390 (D. Md. 1968); *Gulf Stevedore Corp. v. Hollis*, 298 F. Supp. 426 (S.D. Tex. 1969), *aff'd* 427 F.2d 160 (5th Cir. 1970), *cert. denied* 400 U.S. 831 (1970); and *Traveler's Insurance Co. v. Cardillo*, 225 F.2d 137 (2d Cir. 1955), the issue before each court was whether an employee who suffers a permanent injury to an anatomical member listed in a section 8(c) schedule which results in the loss of the member, or a partial loss, but does not result in a loss of earning capacity is entitled to benefits under section 8(c). In each case the employer argued that in order for the employee to recover for his

[7] The *Williams* case is discussed in detail, at 21-23, *infra.*

anatomical loss under section 8(c), he must have incurred a loss of wage earning capacity. In each of those cases the court held that the schedule provide the measure of the recovery. Respondent Cross does not challenge any of those holdings. It is clear that the very purpose of including the scheduled benefit provision was to enable an employee who suffers an anatomical loss to a listed member to receive compensation for that loss even if he did not incur economic loss. Each of those opinions is consistent with the congressional determination that the schedules establish "arbitrarily set healing periods." H.R. Rep. No. 2067, 84th Cong., 2d Sess. 4 (1956).

Similarly, in *Owens v. Traynor*, 274 F. Supp. 770 (D. Md. 1966), *aff'd* 396 F.2d 783 (4th Cir. 1968), *cert. denied* 393 U.S. 962 (1968), the employee suffered a back injury (a non-scheduled loss) and incurred no loss of wage earning capacity. The court held that an anatomical impairment did not equal a disability. If the injury was not scheduled and the loss did not result in a reduction of wage earning capacity, there could be no recovery under section 8(c). At no time did the court consider the issue of whether an employee with both a scheduled loss and lost earning capacity may elect to receive his benefits under section 8(c)(21).

Rupert v. Todd Shipyards, Inc., 239 F.2d 273 (9th Cir. 1956), dealt with whether an employee could collect both benefits for permanent total disability (resulting from head injuries) and permanent partial disability due to a scheduled loss (disfigurement). The court held that permanent partial benefits could not co-exist with an award for permanent total disability. In *Eastern S.S. Lines, Inc., v. Monahan*, 110 F.2d 840 (1st Cir. 1940) the court held that, in light of the employee's economic and personal history, it was not inconsistent to find

the employee both temporarily totally disabled and capable of performing light work. While the injury was to the employee's heel (a potential scheduled loss), the case focused on temporary benefits and gave no indication that section 8(c) or any manner of permanent partial disability benefits were at issue.

The Second Circuit considered a case in which an employee who had suffered the loss of the use of his eye in an earlier non-industrial accident was not entitled to recover benefits under the scheduled loss provisions after he lost that eye in an industrial accident. The court denied him benefits because he had incurred no loss of wage earning capacity. *Iacone v. Cardillo*, 208 F.2d 666 (2d cer. 1953). This opinion appears to be in conflict with the same court's decision in *Bethlehem Steel Co. v. Cardillo*, 229 F.2d 735 (2d Cir. 1956). However, the distinction between these two cases centers on the lack of added impairment in *Iacone, supra*. In any event, the court in *Bethlehem* held that the loss of actual wage earning capacity was irrelevant to eligibility to receive compensation for a scheduled loss.

In *Flamm v. Hughes*, 329 F.2d 370 (2d Cir. 1964), the issue before the court was whether Congress could properly establish schedules of benefits for certain injuries for certain fixed periods and other provisions with indefinite benefits for other injuries. The Court noted:

> Nor is it irrational for Congress to provide a specific schedule of compensation limited to a prescribed number of weeks for enumerated permanent partial disabilities and yet provide compensation for an indefinite period of time for all other injuries leading to permanent partial disability.

Id. at 380. The court was never faced with deciding whether the relief under the scheduled provisions bars section 8(c)(21). Indeed, in *Flamm*, the basic issue surrounded the fact that the employee was originally awarded temporary total disability benefits for a back injury and permanent partial benefits for a foot injury. On reconsideration, the Deputy Commissioner found the employee permanently partially disabled under section 8(c)(21) as a result of a number of non-specified infirmities and not permanently partially disabled as a result of the foot injury. There is no indication that Flamm qualified for a scheduled loss benefit or that he was foreclosed from asserting his right to elect such a benefit. Rather, the court only held that Congress could treat different injuries in different manners.

C. *Williams v. Donovan* Was Incorrectly Decided.

As pointed out above, the only reported cases which have attempted to interpret section 8(c) of the Act with regard to the right of an employee to elect to receive benefits as a result of his economic disability under section 8(c)(21) rather than for his anatomical loss under the scheduled loss provisions are the instant case, *Mason v. Old Dominion Stevedoring Corp., supra; Collins v. Todd Shipyards Corp., supra;* and *Williams v. Donovan*, 234 F. Supp. 135 (E.D. La. 1964), *aff'd* 367 F.2d 825 (5th Cir. 1966), *cert. denied* 386 U.S. 977 (1967). Only *Williams* held that the scheduled benefit provisions bar the right to elect benefits under section 8(c)(21). Yet, the continued viability of the *Williams* decision is doubtful for a number of reasons. First, it appears from the decision that the employee's primary contention was that he was totally disabled and entitled to benefits under

section 8(a) of the Act. That position was rejected because the record clearly supported the Deputy Commissioner's findings that Williams was not totally disabled; indeed there was testimony that he could work as a stevedore, a flagman, a wrench operator, a "hook-on-man" or a forklift driver. (J.A. 56(a)). The question as to the exclusivity of the schedule was only of secondary importance. Moreover, the decision of the District Court was affirmed by the Fifth Circuit in a *per curiam* opinion (367 F.2d 825, J.A. 63(a)-64(a)) which, as pointed out in the opinion below (J.A. 14(a)), did not address the exclusivity issue. It appears that the decision was affirmed on the basis of ". . . whether the award is supported by the record considered as a whole." (J.A. 64(a)). That issue appears to address only the first portion of the district court's opinion in which it found that the record supported the finding that the employee was not totally disabled. (J.A. 54(a)-57(a)).[8]

Furthermore, the decision in *Williams* predated the decision of the District of Columbia Circuit in *American Mutual Insurance Company v. Boston v. Jones, supra,* which firmly established the distinction between economic disability and scheduled benefits. It is in light of that distinction that the Benefits Review Board and the court below have disregarded *Williams* and have found that "economic disability" is an "other case" compensable under section 8(c)(21).

[8]The confusion as to whether the issue as to the exclusivity of the schedule was raised below becomes greater after an examination of the briefs. While the brief of the petitioner (the employee) was not available through the Library of Congress, or this Court, a review of the brief of the Respondent Commissioner indicates that the Petitioner only raised the issue of total disability. Brief of Respondent Commissioner of the Office of Workmen's Compensation at 25-7 (5th Cir., Doc. No. 22, 224).

PEPCO seeks to retrieve the disregarded doctrine of *Williams* by citing to *Jacksonville Shipyards, Inc. v. Dugger*, 587 F.2d 197 (5th Cir. 1979), which distinguished its result from the *Williams* decision. It is critical to note that the decision in *Dugger* involved the question as to whether the scheduled loss provisions barred compensation under the permanent total disability provision. The Fifth Circuit relied on the holding of the District of Columbia Circuit in *Jones, supra*, and distinguished *Williams*. That court did not have before it, nor did it address the issue as to the exclusivity of the scheduled loss provisions to section 8(c)(21).

It is undisputed that Respondent Cross has incurred a significant loss of his wage earning capacity as a result of his knee injury. The Administrative Law Judge found that he incurred a loss of $6,766.92 in earning capacity each year. Using the life expectancy relied upon by PEPCO (Brief of Petitioner at 9), he will lose in wages $203,007.60 over the course of his lifetime. Cross respectfully submits that the record clearly shows that he is a productive workman, who is permanently partially disabled on the basis of his economic loss of wage earning capacity. Even under the award below, Cross will never recover one-third of his lost earning capacity, which will result in a direct economic loss to him of $67,661.80. Certainly Congress did not intend to limit Cross' compensation for a $203,007.60 lifetime loss to $3,191.97. Congress' action of establishing the scheduled loss benefits to compensate an employee for the fact of incurring an anatomical loss was motivated to protect and compensate those employees. It was not Congress' intention nor is it the statute's effect to use that humanitarian schedule to penalize and deprive an employee of compensation for that which he has lost.

CONCLUSION

On the basis of the foregoing, the Respondent Terry M. Cross, Jr., respectfully requests that this Honorable Court affirm the decision below of the United States Court of Appeals for the District of Columbia Circuit and dismiss the writ of certiorari issued to that court.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-816

POTOMAC ELECTRIC POWER COMPANY, PETITIONER

v.

DIRECTOR, OFFICE OF
WORKERS' COMPENSATION PROGRAMS,
UNITED STATES DEPARTMENT OF LABOR
AND
TERRY M. CROSS, JR.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

OPINIONS BELOW

The opinion of the court of appeals (App. 5a-40a) is reported at 606 F.2d 1324.[1] The opinion of the Benefits Review Board (App. 41a-44a) is reported at 7 B.R.B.S. 10.

[1] "App." refers to the appendix bound together with petitioner's brief.

The Decision and Order of the administrative law judge (App. 45a–51a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 24, 1979. The petition for a writ of certiorari was filed on November 23, 1979, and was granted on February 19, 1980. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether an employee under the Longshoremen's and Harbor Workers' Compensation Act who suffers a permanent reduction in wage-earning capacity because of an injury listed in the Act's schedule of benefits may elect to recover compensation for loss of earning capacity rather than the scheduled benefit.

STATUTES INVOLVED

1. Section 2(10) of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 902(10), provides:

> When used in this Act—
>
> * * * * *
>
> (10) "Disability" means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment.

2. Section 8 of the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 908, provides in relevant part:

> Compensation for disability shall be paid to the employee as follows:
>
> * * * * *

> (c) Permanent partial disability: In case of disability partial in character but permanent in quality the compensation shall be 66⅔ per centum of the average weekly wages, which shall be in addition to compensation for temporary total disability or temporary partial disability paid in accordance with subdivision (b) of subdivision (e) of this section, respectively, and shall be paid to the employee, as follows:
>
> * * * * *
>
> (2) Leg lost, two hundred and eighty-eight weeks' compensation.
>
> * * * * *
>
> (19) Partial loss or partial loss of use: Compensation for permanent partial loss or loss of use of a member may be for proportionate loss or loss of use of the member.
>
> * * * * *
>
> (21) Other cases: In all other cases in this class of disability the compensation shall be 66⅔ per centum of the difference between his average weekly wages and his wage-earning capacity thereafter in the same employment or otherwise, payable during the continuance of such partial disability * * *
>
> * * * * *

3. Section 1 of the District of Columbia Workmen's Compensation Act, D.C. Code § 36–501 (1973), provides:

> The provisions of chapter 18 of title 33, U.S. Code, including all amendments that may hereafter be made thereto, shall apply in respect to the injury or death of an employee of an employer carrying on any employment in the District of Columbia, irrespective of the place where the injury or death occurs; except that in applying such provisions the term "employer" shall be held to mean every person carrying on any employment in the District of Columbia, and the term "employee" shall be held to mean every employee of any such person.

STATEMENT

Respondent Terry M. Cross has been employed by petitioner Potomac Electric Power Company ("PEPCO") continually since 1961. From 1972 until he was injured in 1974 he worked as a Class A cable splicer (App. 46a, 69a). That job was physically demanding and required respondent to work under conditions that were often hazardous.[2] He had to lift heavy equipment, climb ladders, and work in manholes and on scaffolding (App. 46a, 69a–71a). Sometimes he would work with "hot" cables while standing in water (App. 69a). These duties could be performed only by an agile worker in good physical condition because of the climbing and twisting involved in handling cables in confined areas (App. 46a, 69a).

In December 1974, respondent injured his left knee while working in a manhole. He filed a claim for benefits under the District of Columbia Workmen's Compensation Act (D.C. Code § 36–501 (1973)), which makes the provisions of the Longshoremen's and Harbor Workers' Compensation Act (33 U.S.C. 901 *et seq.*) applicable to most nongovernmental employment within the District. Petitioner and respondent could not agree on the amount of compensation payable on account of the injury, and the matter was therefore referred to an administrative law judge for a formal hearing (App. 6a–7a).

At the hearing, two doctors testified that, as a result of his knee injury, respondent had suffered a permanent partial loss of the use of his leg, which one doctor estimated at 20% and the other at 5% (App. 46a).[3] The administrative

[2] As used in this brief, "respondent" refers to the individual claimant.

[3] The doctors who testified at the hearing described respondent's physical condition in terms of medical "disability." In general, however, "disability" under the Longshoremen's Act is an economic concept (see page 9, *infra*).

law judge found that, although respondent was still classified as a Class A cable splicer, he could no longer perform all the rigorous work that the job entailed. As a result, respondent had been denied several salary increases and was no longer permitted to work overtime (App. 47a).

The administrative law judge rejected petitioner's contention that the compensation due on account of the injury should be based on the Act's fixed "schedule" award for the loss (including loss of use) of a leg. Section 8(c)(2) and (19), 33 U.S.C. 908(c)(2) and (19). Instead, he applied Section 8(c)(21) of the Act, 33 U.S.C. 908(c)(21), which authorizes compensation in the amount of two-thirds of the difference between a claimant's pre-injury average weekly wages and his post-injury wage-earning capacity. Using respondent's past earnings as a guide, the judge concluded that respondent had suffered a permanent loss in wages of approximately $130 per week as a result of the injury. Accordingly, he awarded respondent two-thirds of that amount, or $86 per week, payable without limitation as to the number of weeks (App. 47a–49a).

Petitioner appealed to the Benefits Review Board pursuant to Section 21(b) of the Act, 33 U.S.C. 921(b), contending that respondent should have been limited to a scheduled award. The Board affirmed the administrative law judge's decision, holding that the scheduled benefits are not exclusive and that where a claimant can prove a loss in wage-earning capacity greater than the compensation provided by the schedule, he may pursue a claim under Section 8(c)(21) (App. 41a–43a).

The court of appeals affirmed the Board's decision by a divided vote (App. 5a–40a).

SUMMARY OF ARGUMENT

The Longshoremen's and Harbor Workers' Compensation Act requires covered employers to provide compensation for disability arising from injuries suffered by their employees in the course of employment. The Act defines disability as a loss of wage-earning capacity resulting from such an injury, and this economic loss concept governs recoveries for total disability, either temporary or permanent, and for temporary partial disability. However, Section 8(c) of the Act, 33 U.S.C. 908(c), which is concerned with permanent partial disability, includes both a schedule of fixed benefits for major physical impairments, such as the loss of an arm or a leg, and a provision (Section 8(c)(21), 33 U.S.C. 908(c)(21)) for calculating compensation in accordance with the Act's basic definition of disability. To collect a scheduled benefit, the worker need prove only that he suffered an injury listed in the schedule; he need not prove loss of wage-earning capacity.

The court of appeals correctly rejected petitioner's contention that only those employees suffering injuries not listed on the schedule may recover for loss of wage-earning capacity under Section 8(c)(21). The court correctly held that an employee who suffers a scheduled impairment that also results in a permanent reduction in his wage-earning capacity may elect to recover compensation for economic loss under Section 8(c)(21) as an alternative to recovering the scheduled benefit. In reaching this conclusion, the court of appeals accorded proper deference to the views of the Benefits Review Board and the Director of the Office of Workers' Compensation Programs, who are charged with administering the Act.

Nothing in the language of the Act precludes the construction upheld by the court of appeals. The Act does not expressly provide that the scheduled benefits are the exclusive remedy for a claimant suffering a listed impairment. To the contrary, Section 8(c)(21) may reasonably be read as applying to *any* employee suffering a permanent reduction of his wage-earning capacity who does not seek a scheduled award, either because the injury he suffered is not listed in the schedule or because he sustained an economic loss from a scheduled impairment that exceeds the amount automatically recoverable under the schedule.

Moreover, although the legislative history of the Act and its amendments contain no statement directly bearing on the issue in this case, that history does indicate that the fundamental purpose of the Act is to compensate covered employees for loss of wage-earning capacity resulting from industrial injuries. The schedule serves that purpose in the case of employees whose loss of wage-earning capacity resulting from a scheduled injury is less than or roughly equivalent to the scheduled benefit, or is difficult to prove. The schedule also ensures that an employee who suffers a major impairment, such as the loss of a limb, will receive some compensation regardless of whether he can prove a loss of wage-earning capacity. But rigid adherence to the schedule in cases, such as this one, where a claimant is willing and able to show a permanent reduction in wage-earning capacity far in excess of the scheduled benefit would frustrate rather than further the fundamental congressional goal.

Petitioner's view also would result in significant anomalies in the Act's operation. First, some employees suffering a substantial economic loss as a result of a scheduled impairment would be grossly undercompensated in comparison with employees who suffer a similar economic loss as a result of a non-scheduled impairment. Second, employees suffering *temporary* partial disability, for which there is no schedule of benefits, might receive a

greater recovery than employees with a *permanent* partial disability resulting from a scheduled impairment. Third, employees suffering permanent total disability, who recover two-thirds of their average pre-injury earnings for as long as that disability exists, would recover a disproportionately greater amount of compensation than employees with high degrees (perhaps as high as 80% or 90%) of permanent partial disability. In the absence of compelling language in the statute, such irrational results should not be attributed to Congress.

Finally, contrary to petitioner's assertion, a construction of Section 8(c)(21) that forces employees suffering scheduled injuries to seek compensation pursuant to the schedule would not necessarily minimize litigation. The reported cases do not suggest that many employees suffering permanent partial disability seek to escape the schedule and prove economic loss. Moreover, denying employees suffering scheduled injuries the right to proceed under Section 8(c)(21) would encourage those who do suffer substantial wage losses to claim that they are totally (rather than partially) disabled or that their scheduled impairments have produced physical effects in other parts of their bodies. Such claims, which petitioner apparently concedes need not be adjudicated under the schedule, might themselves result in additional burdensome litigation.

ARGUMENT

UNDER THE LONGSHOREMEN'S AND HARBOR WORKERS' COMPENSATION ACT, AN EMPLOYEE WHO SUFFERS A PERMANENT REDUCTION IN WAGE-EARNING CAPACITY BECAUSE OF A "SCHEDULED" INJURY MAY ELECT TO RECOVER COMPENSATION FOR LOSS OF WAGE-EARNING CAPACITY RATHER THAN THE SCHEDULED BENEFIT

A. Introduction

The Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. 901 *et seq.*, requires covered employers to provide compensation for disability arising from injuries suffered in the course of employment.[4] Section 2(10) of the Act defines "disability" in economic terms as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." 33 U.S.C. 902(10). The Act recognizes four types of disability—permanent total, temporary total, permanent partial, and temporary partial—and prescribes rules for determining the amount of compensation due in each instance. With one exception, these rules are calculated to compensate the employee in proportion to his actual economic loss as a result of the injury.[5]

The exception occurs with respect to compensation for permanent partial disability, which is governed by Section 8(c) of the Act, 33 U.S.C. 908(c). That Section includes a schedule of fixed benefits for certain enumerated injuries, providing that the employee be paid the equivalent of two-thirds of his average weekly earnings for a specified number of weeks. 33 U.S.C. 908(c)(1)-(20). The schedule therefore amounts to a flat entitlement to compensation for any listed injury, requiring no proof from the claimant that the injury has in fact caused him disability as defined

[4] The Act is made applicable to most nongovernmental employers within the District of Columbia by D.C. Code § 36-501 (1973).

[5] Under Section 8(a), 33 U.S.C. 908(a), an employee who is permanently totally disabled receives two-thirds of his previous average weekly wages indefinitely. Under Section 8(b), 33 U.S.C. 908(b), an employee who is temporarily totally disabled receives two-thirds of his previous average weekly wages while he remains disabled. Under Section 8(e), 33 U.S.C. 908(e), an employee who is temporarily partially disabled receives two-thirds of the difference between his previous average weekly wages and his wage-earning capacity after the injury, for so long as he remains disabled, but not for more than five years.

by Section 2(10) of the Act. *Travelers Insurance Co.* v. *Cardillo*, 225 F.2d 137 (2d Cir.), cert. denied, 350 U.S. 913 (1955); *Gulf Stevedore Corp.* v. *Hollis*, 298 F. Supp. 426, 431 (S.D. Tex. 1969), aff'd per curiam (opinion adopted), 427 F.2d 160 (5th Cir.), cert. denied, 400 U.S. 831 (1970). Thus, for example, an employee who loses a leg (see Section 8(c)(2), 33 U.S.C. 908(c)(2)) or the use of a leg (see Section 8(c)(18), 33 U.S.C. 908(c)(18)) is entitled to two-thirds of his pre-injury average weekly earnings for 288 weeks even if his earnings are unaffected by the injury.[6]

Section 8(c), however, also contains a provision for calculating awards in proportion to actual economic loss—the sole method used elsewhere in the Act for forms of disability other than permanent partial disability. See note 5, *supra*. Under this "other cases" provision, Section 8(c)(21), 33 U.S.C. 908(c)(21), a claimant is entitled to two-thirds of the difference between his pre-injury average weekly earnings and his earning capacity after the injury. Petitioner, relying principally on what it asserts is the plain meaning of the statute, contends that the permanent partial disability schedule prescribes the exclusive means of calculating awards for the injuries listed therein. As we show below, however, neither the language nor the legislative history of the statute compels this construction, and interpreting the statute in this manner violates this Court's admonition that the Act should be construed liberally so as to avoid "incongruous or harsh results." *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U.S. 408, 414 (1932). Accord, *Voris* v. *Eikel*, 346 U.S. 328, 333 (1953).

[6]Pursuant to Section 8(c)(19), 33 U.S.C. 908(c)(19), if the loss of use of a body member is less than total, the award is reduced in proportion, *e.g.*, a 50% loss of use of the leg would reduce the scheduled award by half.

In contrast, the view of respondent Director of the Office of Workers' Compensation Programs and of the Benefits Review Board—that an employee who suffers an injury listed in the schedule may, instead of claiming the scheduled award, recover under Section 8(c)(21) if he can establish an actual loss of wage-earning capacity resulting from his injury—is consistent with the purposes of the Act and reduces anomalies in its application. This Court has frequently observed that "the construction of a statute by those charged with its execution should be followed unless there are compelling indications that it is wrong * * *." *E. I. du Pont de Nemours & Co.* v. *Collins*, 432 U.S. 46, 54-55 (1977), quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367, 381 (1969). See also *Cardillo* v. *Liberty Mutual Insurance Co.*, 330 U.S. 469, 478 (1947). In the present case, where there are strong indications that the administrative construction is correct, the court of appeals was clearly justified in upholding it.

B. Neither the Plain Language Nor the Legislative History of Section 8(c) Precludes An Employee From Electing To Recover Workers' Compensation Based on Actual Loss of Wage-Earning Capacity Rather Than The Benefit Schedule

As with any case involving the interpretation of an Act of Congress, the "analysis must begin with the language of the statute itself." *Touche Ross & Co.* v. *Redington*, 442 U.S. 560, 568 (1979). In support of its contention (Br. 5-11) that the "express provisions of the Act" provide that the benefits of Section 8(c)(1)-(19) are, where applicable, the exclusive form of compensation for permanent partial disability, petitioner relies on the use of the phrase "in all other cases" in the preamble to Section 8(c)(21). Petitioner asserts that the phrase can refer only to cases involving permanent partial disability resulting from injuries other

than those listed in the preceding subsections on the schedule.

While petitioner's reading of the statutory language undoubtedly has surface appeal, it is not the only possible construction, particularly when Section 8(c)(21) is considered in the context of the entire Act. It is equally possible to read the phrase "in all other cases" to mean in all cases of permanent partial disability other than those in which an eligible claimant seeks to recover compensation under the schedule—*i.e.*, in all cases in which an employee able to show loss of earning capacity chooses to forego the award to which he would be entitled by virtue of his injury alone. Such a construction would, of course, be foreclosed were the Act to state that the scheduled benefits are exclusive, but the Act contains no such statement.

Moreover, as the court of appeals noted (App. 10a), the Benefits Review Board's construction is a "more rational * * * way of reading the statute." Because the statutory definition of "disability" (Section 2(10)) is explicitly linked to economic loss, because the awards available under the Act for permanent total disability, temporary total disability, and temporary partial disability all relate to actual diminished earning capacity, and because, as we discuss below, the central purpose of the Act is to compensate employees for loss of wage-earning capacity resulting from job-related injuries, it is more sensible to treat the schedule as a narrow exception to a compensation principle of general applicability rather than as an inflexible rule that encroaches on that principle even in cases in which the purposes for which the schedule was devised would not be served. As the court below observed (App. 11a; footnotes omitted):

> [U]nder the the permanent partial disability classification the scheduled injuries are by their very nature considered to be compensable regardless of their concrete impact on the employee's wage-earning capacity. As the Board wrote, "The schedule * * * contemplates an easily administered system of compensation, where a claimant need not prove a loss in wage-earning capacity. Rather, the loss in wage-earning capacity is presumed without reference to claimant's actual occupation." But there is another form that compensation for permanent partial disability may take—that contained in Section 8(c)(21). To establish an entitlement to compensation under this provision the claimant must prove that the injury has resulted in an actual diminution of earning capacity. Thus, although Cross's work-related injury is confined to his left knee—for which he is eligible for compensation under the scheduled benefits—the injury also renders his entire body, as a functioning economic unit, permanently partially disabled. Because he is capable of establishing the actual diminution in earning capacity required for compensation under Section 8(c)(21), he is brought within that part of the compensatory scheme.

Nothing in the legislative history of the Act suggests that the interpretation of Section 8(c)(21) held by the Director, the Benefits Review Board, and the court of appeals is incorrect. As even the dissenting judge below conceded (App. 22a), the legislative reports, hearings, and debates on the Act as passed in 1927 and as later amended "contain[] no clear answer to" the precise question in this case. Thus, congressional intent is best deduced by examining the essential purpose of the Act and determining which construction of Section 8(c) more closely harmonizes with that purpose and is less likely to produce incongruous results. In interpreting legislation, especially remedial legislation, it must be remembered that "words or phrases in a statute come 'freighted with the meaning imparted to them by the mischief to be remedied and by contem-

poraneous discussion. In such conditions history is a teacher that is not to be ignored.' " *St. Paul Fire & Marine Ins. Co.* v. *Barry*, 438 U.S. 531, 545–546 (1978), quoting *Duparquet Co.* v. *Evans*, 297 U.S. 216, 221 (1936). Accord, *United Steelworkers of America, AFL-CIO-CLC* v. *Weber*, 443 U.S. 193, 201 (1979).

1. *The legislative history of the original Act*

When passed in 1927, the permanent partial disability section of the Act included, as it still does, both a schedule of awards for listed injuries and an "other cases" provision. Ch. 509, 44 Stat. 1427 *et seq.* As petitioner points out (Br. 11–12), a Senate version (S.3170) passed in 1926 had not included a schedule, providing instead (in Section 7(a)) that compensation for all types of disability, whether total or partial, be based on the compensation provision of the Federal Employees Compensation Act (FECA), ch. 458, Section 4, 39 Stat. 743, which awarded claimants a percentage of the difference in earning capacity measured before and after the injury. S. 3170, 69th Cong., 1st Sess., 67 Cong. Rec. 10614 (1926), reprinted in *To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Employments (Part 2): Hearing on S. 3170 Before the House Comm. on the Judiciary*, 69th Cong., 1st Sess. 121–136 (1926) (hereinafter "1926 House Hearings (S. 3170)"). The Senate Report explained that a schedule had been included in the version of S. 3170 as originally introduced but was deleted by the committee in favor of the nonschedule FECA compensation formula. S. Rep. No. 973, 69th Cong., 1st Sess. 17 (1926). The committee observed that the commission to be charged with administering the Longshoremen's Act was already familiar with the formula as a result of its administration of FECA and that this would make for "greater certainty of findings and decisions" (*ibid.*). In a

brief debate on the bill, Senator Walsh observed that the schedule would have given longshoremen higher benefits than those enjoyed by similarly situated federal employees, a result he suggested was undesirable. 67 Cong. Rec. 10614 (1926).

Also in 1926, a bill on the same subject (H.R. 12063) was introduced in the House. 67 Cong. Rec. 9408 (1926). Although this bill included a schedule, the accompanying House Report gave no explanation for its inclusion, stating simply that the bill "follows in the main the New York State compensation law" that was "considered one of the best." H.R. Rep. No. 1190, 69th Cong., 1st Sess. 2 (1926). Hearings were held in both Houses. The witnesses at the hearings made references to the schedule contained in the New York law and the effect of adopting it instead of the FECA formula, but there was no discussion of why a schedule for permanent partial disability might or might not be preferable to a formula based solely on loss of wage-earning capacity, or whether a schedule, if adopted, should be the exclusive method of compensation as to the listed injuries. See generally, *Compensation for Employees in Certain Maritime Employments: Hearings on S. 3170 Before a Subcomm. of the Senate Comm. on the Judiciary*, 69th Cong., 1st Sess. (1926) (hereinafter "1926 Senate Hearings"); *To Provide Compensation for Employees Injured and Dependents of Employees Killed in Certain Maritime Employments (Part 1): Hearing on H.R. 9498 Before the House Comm. on the Judiciary*, 69th Cong., 1st Sess. (1926) (hereinafter "1926 House Hearings (H.R. 9498)"); 1926 House Hearings (S. 3170).[7]

[7] Because the federal legislation was patterned after a New York statute, petitioner relies on *Sokolowski* v. *Bank of America*, 184 N.E. 492 (N.Y. 1933), holding that schedule benefits are exclusive under New York law. But that case, decided in 1933, obviously can have no

When the Senate bill was sent to the House in 1927, it was "amended so as to make it conform substantially" to the House bill, including the insertion of a schedule. H.R. Rep. No. 1767, 69th Cong., 2d Sess. 20 (1927). The amended version passed the House following a brief debate that contained no reference to the schedule. 68 Cong. Rec. 5402–5414 (1927). When the final version was passed by the Senate, there was general discussion of the substantiality of the House changes (68 Cong. Rec. 5908 (1927) (remarks of Sen. Reed)) but again there was no reference to the inclusion of a schedule.[8]

bearing on Congress' intent in passing a statute six years earlier. See *Iacono* v. *Cardillo*, 208 F.2d 696, 699 (2d Cir. 1953). Indeed, petitioner cites nothing to show that "Congress was even aware of the [*Sokolowski*] decision, much less that it approved of that decision * * *." *Aaron* v. *SEC*, No. 79-66 (June 2, 1980), slip op. 19 n.18.

To the extent that state court decisions or other extraneous evidence provide any kind of guidance in interpreting the federal statute, they indicate that scheduled benefits should not be treated as exclusive. See, *e.g.*, *American Tank and Steel Corp.* v. *Thompson*, 90 N.M. 513, 515, 565 P.2d 1030, 1032 (1977); *Van Dorpel* v. *Haven-Busch Co.*, 350 Mich. 135, 85 N.W. 2d 97 (1957); *Republic Steel Corp.* v. *Kimbrell*, 370 So.2d 294 (Ala. Civ. App. 1979), writ denied, 370 So.2d 297 (Ala. 1979). According to the author of the leading treatise on the subject (2 A. Larson, *The Law of Workmen's Compensation* § 58.20, at 10–212 to 10–214 (1976)):

> Although it is difficult to speak in terms of a majority rule on this point, because of significant differences in statutory background, it can be said that at one time the doctrine of exclusiveness of schedule allowances did dominate the field. But in recent years there has developed such a strong trend in the opposite direction that one might now, with equal justification, say that the field is dominated by the view that schedule allowances should not be deemed exclusive, whether the issue is treatment of a smaller member as a percentage loss of a larger, or *treatment of any scheduled loss as a partial or total disability of the body as a whole*. [Emphasis added; footnotes omitted.]

[8] In the hearings on the bills that contained a schedule similar to that in the New York law, attention focused primarily on employer objections to the amount of the maximum limits on payments of weekly compensation. (New York then had a $20 weekly limit in addition to the limit represented by the restriction to two-thirds of average weekly wages; there was no such limit in either S. 3170 as introduced or H.R. 9498, although there were proposals to impose a $25 weekly limit.) See, *e.g.*, 1926 House Hearings (H.R. 9498) at 67 (statement of Henry C. Hunter), 90 (statement of O.G. Brown); 1926 Senate Hearings at 46–47 (statement of Cletus Keating), 60–61 (testimony of O.G. Brown). Mr. Brown explained that, under New York law, no payments could be made under the formula *after* scheduled benefits had been paid unless the employee could prove that he was then suffering permanent total disability. The witness did not comment on the question whether an employee suffering a scheduled injury could proceed under the "other cases" provision *as an alternative* to the scheduled benefit. 1926 Senate Hearings at 60. Frances Perkins, Chairman of the New York industrial board, advised the House Committee that she believed it was proper to allow "the full healing period [the period of temporary total disability] in addition to the schedule award and making the schedule losses an actual compensation for disability." She, too, made no comment on the "other cases" provision or the exclusiveness *vel non* of the schedule. 1926 House Hearings (H.R. 9498) at 22.

In the hearings on the bill that omitted a schedule for permanent partial disability benefits, there was only one objection to the absence of a schedule, and it was offered without explanation. 1926 House Hearings (S. 3170) at 215 (letter from the New York Towboat Exchange, Inc.). Discussion by both labor and employer representatives focused on weekly and monthly payment maximums. *Id.* at 139, 149, 205.

2. The legislative history of amendments to the Act

Although Section 8(c) has been amended since its initial passage, none of the amendments concerned the "other cases" provision or bears directly on the issue in this case. Hence, declarations by subsequent Congresses serve only to shed some light on the intent of Congress in enacting the statute in 1927. *Andrus* v. *Shell Oil Co.*, No. 78–1815 (June 2, 1980), slip op. 9 n.8. What little assistance the subsequent legislative history contributes to the analysis supports the Benefit Review Board's construction of Section 8(c)(21).

In 1938, Congress added Section 8(h) to the Act, defining loss of wage-earning capacity for the purposes of Sections 8(c)(21) and 8(e). Under this definition, the Deputy

Commissioner adjudicating a claim under either of those provisions could consider a number of specified factors, including "the effect of disability as it may naturally extend into the future." Act of June 25, 1938, ch. 685, Section 5, 52 Stat. 1165. The committee reports indicate that this provision was added out of concern for the plight of the worker suffering permanent partial injury who "returns to employment without apparent wage loss" (perhaps because his employer has paid his full wages for a time in order to defeat a wage-loss claim) but whose physical condition is such that he suffers "probable impairment of future wage-earning capacity." S. Rep. No. 1988, 75th Cong., 3d Sess. 6 (1938); H.R. Rep. No. 1945, 75th Cong., 3d Sess. 6 (1938). The amendment would, the committee reports suggested, avoid the spectacle of employees finding themselves eventually "cast adrift" and becoming and remaining "object[s] of charity." *Ibid.* Although, as the dissent below observed (App. 25a), the particular example given was an employee suffering a non-scheduled injury (an inoperable hernia), the rationale cannot logically be limited to those suffering non-scheduled injuries, given Congress' concern for the plight of employees suffering long-term uncompensated loss of wage-earning capacity. Instead, the amendment merely underscores and reiterates the intention of Congress to require that employees be compensated for disability in the economic sense.[9]

[9]The dissent below (App. 25a) also takes note of the 1938 committee reports' references to "wasteful litigation." But it is clear from the context that the committees were concerned not with litigation in cases not properly subject to Section 8(c)(21) but rather with litigation in proper cases over the question of what constituted a loss of wage-earning capacity. The committees believed that this problem arose simply from an "absence of clarity" in the Act about the meaning of "wage-earning capacity." S. Rep. No. 1988, *supra*, at 5; H.R. Rep. No. 1945, *supra*, at 5.

The 1972 amendments are no more helpful to petitioner. Petitioner relies heavily (Br. 14–23) on Congress' refusal in 1972 to adopt a proposed amendment to Section 8(c), suggesting that Congress thereby considered and rejected the notion of permitting awards such as the one received by respondent.[10] But the amendment in question did not concern employees' recovery of compensation under Section 8(c)(21) as an *alternative* to recovery of the scheduled award. It would, instead, have authorized *successive* awards, allowing a claimant to recover both the full scheduled benefit of two-thirds of his regular earnings for the specified number of weeks *and* two-thirds of his earnings loss thereafter. S. 2318, Section 7, 92d Cong., 2d Sess. (1972), reprinted in *Longshoremen's and Harbor Worker's Compensation Act Amendments of 1972: Hearings Before the Subcomm. on Labor of the Senate Comm. on Labor and Public Welfare*, 92d Cong., 2d Sess. 7 (1972) (hereinafter "1972 Senate Hearings"); H.R. 12006, Section 7, 92d Cong., 1st Sess. (1971), and H.R. 15023, Section 7, 92d Cong., 2d Sess. (1972), reprinted in *Longshoremen's and Harbor Workers' Compensation Act: Hearings Before the Select Subcomm. on Labor of the House Comm. on Education and Labor*, 92d Cong., 2d Sess. 27, 38 (1972).

[10]Petitioner does not rely, nor could it reasonably do so, on the doctrine that the failure of Congress to amend a particular provision when it amends other parts of the same statute may be taken as acquiescence in a line of administrative or judicial authority construing that provision. See *United States* v. *Rutherford*, 442 U.S. 544, 554 n.10 (1979). There is no evidence that in 1972 Congress had its attention drawn to *Williams* v. *Donovan*, 234 F.Supp. 135 (E.D. La. 1964), aff'd, 367 F.2d 825 (5th Cir. 1966), cert. denied, 386 U.S. 977 (1967) (see page 27, *infra*), or any other decision bearing on the issue in this case. (See notes 16 & 20, *infra*.) Neither is there any evidence that decisions of the Benefits Review Board on this issue since 1975 (see page 28, *infra*) have been brought to the attention of Congress, which has made minor changes in the Act since that time. See, *e.g.*, Pub. L. No. 95-598, Title III, Section 324, 92 Stat. 2679.

The bills reported out by the House and Senate committees did not include the provision and gave no explanation for the deletion. S. Rep. No. 92-1125, 92d Cong., 2d Sess. (1972); H.R. Rep. No. 92-1441, 92d Cong., 2d Sess. (1972).[11] Petitioner (Br. 17-22) cites certain comments made by witnesses at the hearings on the bills, but none of these witnesses expressed the view that under the Act as it then existed an employee suffering from a scheduled injury was precluded from recovering under Section 8(c)(21) as an *alternative* (rather than in addition) to the scheduled benefit.[12]

[11] As petitioner notes (Br. 13-14), Congress did enact provisions in the Federal Employees Compensation Act authorizing cumulative recoveries, *i.e.*, recovery of a scheduled award for permanent partial disability followed by payment for wage loss after the scheduled period. Act of Oct. 14, 1949, ch. 691, Section 104, 63 Stat. 855; Act of Sept. 6, 1966, Pub. L. No. 89-554, 80 Stat. 536. But Congress' decision to offer such *cumulative* benefits under FECA hardly suggests that it intended to prohibit *alternative* benefits under a separate statute. For the same reason, the dissenting judge in the court of appeals is in error in suggesting that respondent "effectively seeks to do under the Longshoremen's Act [what a claimant can do under FECA], namely, obtain the benefit of the scheduled payment supplemented by two-thirds of the difference in his lost earning capacity" (App. 29a).

[12] Although none of the witnesses at the committee hearings addressed the precise issue involved here, a number of witnesses did comment with respect to scheduled benefits in general. For example, one witness who opposed the proposal did so because he believed it unnecessary, on the theory that "[t]he present language of the Act is adequate to allow benefits to be continued under the general sections, if disability is in fact continuing." 1972 Senate Hearings at 445 (statement of Joseph M. Shelton). Other witnesses, including Ralph Hartman and Andre Maisonpierre (see Pet. Br. 17-19), suggested simply eliminating the schedule and basing compensation entirely on loss of wage-earning capacity. *Id.* at 183-185, 221, 240-241. Edward D. Vickery objected to the potential cost, stating: "If an employer is going to have to pay on the basis of a partial loss of wage-earning capacity, it ought to be done on that basis only, and the employer should not be required to pay *both* for a specific period of weeks and then for loss of wage-earning capacity on top of that." *Id.* at 332 (emphasis added). It would appear that in urging payment on the basis of "wage-earning capacity" alone, Vickery, like Hartman and Maisonpierre, was urging deletion of the schedule as an alternative to the proposed amendment.

3. *The teaching of the legislative history*

The legislative record, while ambiguous on the question presented in this case, leaves no doubt that the dominant purpose of Congress in enacting the statute was to compensate injured workers for their lost wages as a matter of "simple justice." H.R. Rep. No. 1767, 69th Cong., 2d Sess. 19-20 (1927); S. Rep. No. 973, 69th Cong., 1st Sess. 16 (1926). See also *Baltimore & Philadelphia Steamboat Co.* v. *Norton*, *supra*, 284 U.S. at 414. The aim of "putting an end to the costly and time-consuming actions for damages at common law," described by the dissenting judge below as "the overall goal" of statute (App. 23a), was merely incidental to this purpose. To be sure, the schedule does serve to provide workers with a speedy remedy and to allow them to avoid sometimes difficult problems of proof. As the Benefits Review Board observed (App. 42a-43a), the schedule offers "an easily administered system" of fixing the amount of payment due in many cases.[13]

But the goal of reasonably prompt and certain compensation for covered injuries is advanced by the Act even apart from the schedule,[14] and the schedule serves other purposes as well. Even if a scheduled injury does not reduce a worker's earning power, it is likely to impair sub-

[13] As we discuss below (see pages 26-30, *infra*), however, acceptance of petitioner's construction of Section 8(c)(21) would not necessarily minimize costly and time-consuming litigation.

[14] The delays of the pre-1927 litigation system were thought to be associated in large part with "the old common-law defenses which could be then interposed in cases for damage accruing from injuries sustained in industry." 68 Cong. Rec. 5414 (1927) (remarks of Rep. LaGuardia); see also 1926 House Hearings (S.3170) at 211 (statement of Edgar Wallace, American Federation of Labor). Those defenses were abolished as to all claims under the Act, not just those pursued under the schedule.

stantially the general quality of his life. Because, with exceptions not here relevant, the Act is an exclusive remedy for injuries that come within its terms (33 U.S.C. 905), the worker cannot sue his employer for damages. The schedule ensures that a worker who suffers a permanent physical impairment, such as loss of an arm or a leg, that does not totally disable him from working will not go entirely uncompensated.[15] "[I]n effect, the claimant is being compensated for loss of the body member, not lost earning capacity." *Gulf Stevedore Corp.* v. *Hollis*, *supra*, 298 F. Supp. at 431.[16]

[15]There is, however, no similar need for a schedule in the categories of disability other than permanent partial disability. In "total disability" cases, the worker who proves his claim necessarily will collect compensation under the economic loss test; and so long as the schedule exists for permanent partial disability, there is no need to provide one for temporary partial disability because the loss of a bodily member in itself warrants compensation under the permanent partial disability schedule.

[16]Thus, when Congress added a benefits schedule to the Federal Employees Compensation Act in 1949, the Senate Report explained (S. Rep. No. 836, 81st Cong., 1st Sess. 17 (1949)):

> The absence of a schedule * * * has presented two principal difficulties, the first of which is the extreme difficulty in determining fairly and objectively the precise extent to which a particular physical impairment diminishes the injured employee's wage-earning capacity. [Second, a] particular physical impairment to a member or function of the body does not always cause a proportional reduction in earning capaciity. * * * It is understandable that employees with such losses expect some form of indemnity for their loss.

As petitioner notes (Br. 30), two courts have decried this view as erroneously suggesting that the schedule simply puts "a 'price' on certain parts of the human body" and have explained it instead as establishing conclusive presumptions of the loss of wage-earning capacity produced by certain types of major impairments. *Iacone* v. *Cardillo*, 208 F.2d 696, 699 (2d Cir. 1953). *Rupert* v. *Todd Shipyards*, 239 F.2d 272, 275 (9th Cir. 1956). But neither of those cases concerned the issue presented here, and there is, in any event, no necessary conflict between the two theories. Congress provided the conclusive presumption for employees with certain types of permanent injuries who, for any reason, wish to avoid the necessity of proving actual loss of wage-earning capacity. It functions as both a substitute for such proof and compensation for the physical impairment.

These purposes may be fully served, however, without confining to the schedule every employee suffering one of the listed impairments, even when he can and is willing to prove that he sustained a loss of wage-earning capacity greater than the scheduled benefit. As the court of appeals remarked, "[p]ermanent partial disability, no less than total disability, is an economic concept whose meaning in any single case is tied inextricably to the claimant's wage-earning capabilities. Where the scheduled benefits fail adequately to compensate for a diminution in those capabilities, Section 8(c)(21) is the remedial alternative" (Pet. App. 12a; footnote omitted). It would be an odd construction of a remedial statute indeed to seize upon provisions of the Act intended to provide injured claimants with a speedy and certain remedy as a reason for denying them the opportunity to obtain a more beneficial remedy offered by the statute.

In sum, petitioner's construction of Section 8(c) would undermine the fundamental goal of Congress in enacting the Act—compensating injured workers for their loss of wage-earning capacity. As we explain below, only the construction of the statute employed by the Benefits Review Board and upheld by the court of appeals serves that purpose and avoids inequities that Congress should not be presumed to have intended. See *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 543-544 (1940).

C. A Construction of Section 8(c) That Treats Scheduled Awards as Exclusive Produces Incongruous Results that Congress Cannot Reasonably Have Intended

The result of the construction of Section 8(c) of the Act urged by petitioner is that claimants suffering severe dis-

ability as a result of any one of the major impairments listed in the schedule may be granted only a tiny fraction of the amount representing their loss in wage-earning capacity, even though compensation for such losses is the main purpose of the Act. The present case illustrates the point well. Respondent's economic loss has been found to equal approximately $130 a week, and his recovery under Section 8(c)(21) is two-thirds of that amount, or $86 a week (App. 49a). If respondent is confined to the scheduled award for partial loss of the use of his leg, he will, according to petitioner's own calculations (Br. 8–9), receive less than 10% of his present award and only about 6% of his economic loss. Had respondent's disability been produced by a nonscheduled injury, he would indisputably be entitled to two-thirds of his actual wage loss. It is most unlikely that Congress would have intended to effectuate the central goal of compensation in the case of workers who suffer nonscheduled impairments—*i.e.*, impairments not sufficiently common or important to be listed in the schedule—but not in the case of workers suffering scheduled impairments.

Petitioner's construction also leads to irrational results in the treatment of temporary partial disability. There is no schedule of benefits for this category of disability. Under Section 8(e), 33 U.S.C. 908(e), an employee suffering such disability recovers two-thirds of his loss of wage-earning capacity for as long as the disability endures, up to a limit of five years. A large loss of wage-earning capacity judged to be temporary, but continuing for close to five years, might well entitle a victim to benefits far exceeding the appropriate scheduled award for permanent partial disability. This is so even though scheduled awards are based on two-thirds of average earnings rather than two-thirds of lost wage-earning capacity, because many of the scheduled awards provide such compensation for a

substantially shorter period than the 260 weeks comprising five years.

Again, the present case provides a striking illustration. If respondent is confined to the schedule, he may recover at most only about $12,800 and perhaps as little as $3200 for his permanent disability, depending on how the trier of fact resolves the conflict in the medical testimony regarding the degree to which his leg is impaired (see Pet. Br. 8; App. 46a). If, however, respondent's disability were deemed merely temporary, he could recover more than twice the maximum scheduled amount, or some $22,400.[17] Congress can hardly have intended to provide adequate compensation for those whose partial disability is temporary and to deny it to those, like respondent, for whom such disability is permanent.

A third anomaly exists with respect to cases in which a scheduled injury produces physical effects that extend beyond the loss of a listed body member. Petitioner, arguing (Br. 4, 7, 29) that the schedule should apply in this case because respondent's injury was confined entirely to his leg, implicitly concedes that where the effect of a scheduled injury extends to another part of the body, the employee may escape the schedule and prove the extent of his disability.[18] Yet compensating a claimant for such

[17] The sum ($86 per week) found by the administrative law judge to represent respondent's loss of wage-earning capacity (App. 49a) would amount to $22,400 if paid weekly for five years.

[18] This point is well established in the general law of workers' compensation. Although there are no judicial decisions on the point under the Longshoremen's Act, the "great majority of modern decisions" under similar state statutes, as Professor Larson explains, hold that the schedule allowances are not exclusive where the injury has a physical effect on the remainder of the body. 2 A. Larson, *supra*, § 58.20, at 10–197. Professor Larson is of the view that the same result should apply where, although the physical effects are localized, the economic effects of the injury extend to the body as a whole. *Id.* at 10–219.

broader effects of a scheduled injury is as inconsistent with the principle of exclusivity of scheduled awards as is compensating a claimant for broader effects in the form of damage to his body "as a functioning economic unit" (App. 11a).

Finally, petitioner's construction of Section 8(c)(21) would result in irrationally disparate treatment between employees judged as totally disabled and those who can establish high degrees of partial disability. Under Section 8(a) of the Act, a person with a permanent total disability, whether the disability is produced by a scheduled injury or not, is entitled to receive two-thirds of his previous average weekly wages indefinitely. A person who is confined to a scheduled award, however, may recover two-thirds of his wages for only a limited period—in no case more than six years and in many instances less than one year. 33 U.S.C. 908(c)(1)–(20). Thus, under petitioner's construction of the Act, a claimant suffering an 80% to 90% disability (*i.e.*, a near-total decline in wage-earning capacity) would almost surely be limited to a minute fraction of the compensation received by a claimant with the same injury who is deemed totally disabled. This difference is particularly unjust because the employee deemed only partially disabled is one who is making an effort to continue in some form of employment, even if he is unable to perform work that pays as well as work he could do prior to his injury. See *Mason* v. *Old Dominion Stevedoring Corp.*, 1 B.R.B.S. 357, 365 (1975); *Brandt* v. *Avondale Shipyards, Inc.*, 8 B.R.B.S. 698, 701–702 (1978). Moreover, as we discuss below, the existence of this disparity in treatment is at least as likely to increase litigation of claims under the Act as the principle of schedule exclusivity is to reduce it.

D. Petitioner's Construction of Section 8(c) Would Not Necessarily Minimize Litigation Under the Act

Petitioner suggests (Br. 14, 30–31) that its construction of Section 8(c) of the Act reflects Congress' deliberate intent to minimize "case-by-case" adjudication even at the expense of grossly undercompensating some employees for disability produced by industrial injuries.[19] As we have already noted (page 21, *supra*), the Congress that enacted the Act and subsequent Congresses that amended it *have* been concerned with administrative convenience—with assuring that, wherever possible, claims may be settled promptly—but the dominant purpose of the Act is to provide adequate compensation to injured workers. The construction of Section 8(c) urged by petitioner undermines that purpose, and it does not necessarily ensure that there will be decreased litigation of claims under the Act.

As the paucity of reported decisions indicates, litigation of the issue presented in this case has been rare. The only decision directly on point, aside from that of the court below, is *Williams* v. *Donovan*, 234 F. Supp. (E.D. La. 1964), aff'd, 367 F.2d 825 (5th Cir. 1966), cert. denied, 386 U.S. 977 (1967), holding that the schedule is exclusive for

[19] Claims brought under Section 8(c)(21) generally are not as simply resolved as claims brought under the schedule (although, as explained below, claims for partial loss of use of a body member may generate complex litigation). When an employee seeks to recover under Section 8(c)(21) and the parties cannot agree on the extent of loss of wage-earning capacity, an administrative law judge must determine the employee's economic loss by comparing his average pre-injury earnings with his post-injury wage-earning capacity. The latter may be measured by actual earnings, but if there are no earnings or the earnings do not fairly represent post-injury wage-earning capacity, the judge may fix a figure based on certain specified factors. 33 U.S.C. 908(h). Payments for permanent partial disability continue for as long as the disability exists, but the case may be reopened for redetermination of the amount awarded when changed conditions produce a change in wage-earning capacity. 33 U.S.C. 922.

listed injuries that cause permanent partial disability. It would appear that in the great majority of cases, claimants have preferred to proceed under the schedule, either because they valued an award of quick and certain benefits or because, unlike respondent, they lacked clear proof of a significant loss of wage-earning capacity.[20]

In the years since 1975, when the Benefits Review Board expressly declined to follow the Fifth Circuit's decision in *Williams* v. *Donovan*, *supra*, and upheld an award of permanent partial disability under Section 8(c)(21) to an employee who had suffered a scheduled injury, there appear to have been only ~~four~~ five cases, including this one, in which the issue has been litigated before the Board. *Mason* v. *Old Dominion Stevedoring Corp.*, *supra*; *Richardson* v. *Perna & Cantrell, Inc.*, 6 B.R.B.S. 588 (1977); *Brandt* v. *Avondale Shipyards, Inc.*, 8 B.R.B.S. 698 (1978); *Collins* v. *Todd Shipyards Corp.*, 9 B.R.B.S. 1015 (1979). This is persuasive evidence that few employees eligible for scheduled awards instead seek to recover for their actual economic losses under Section 8(c)(21).

But even if a larger number of employees eligible for scheduled awards were to seek compensation under Section 8(c)(21), it is not clear that there would be a net increase in litigation. If petitioner's view prevails, there will be a strong incentive for employees with scheduled injuries who face substantial income losses over the years to

[20] Employees suffering a scheduled injury under the Act are entitled to an award even in the absence of proof of actual disability. See, *e.g.*, *Bethlehem Steel Co.* v. *Cardillo*, 229 F.2d 735 (2d Cir. 1956); *Travelers Insurance Co.* v. *Cardillo*, 225 F.2d 137, 143-144 (2d Cir.), cert. denied, 350 U.S. 913 (1955); *Gulf Stevedore Corp.* v. *Hollis*, 298 F. Supp. 426 (S.D. Tex. 1969), aff'd per curiam (opinion adopted), 427 F.2d 160 (5th Cir.), cert. denied, 400 U.S. 831 (1970). In such cases, the award serves to compensate the injured employee for the permanent loss (or loss of use) of a body member. See note 16, *supra*.

attempt to prove either that the effects of the injury have spread to other parts of the body or that they are totally disabled. Litigation over the technical medical issues involved in proving diffused physical effects can be expected to be complex and lengthy in many cases. Litigation of total disability claims also can be time-consuming, because an employee need not be totally bedridden to prove his claim under Section 8(a) of the Act. See *American Stevedores, Inc.* v. *Salzano*, 538 F.2d 933, 935-936 (2d Cir. 1976); *Watson* v. *Gulf Stevedore Corp.*, 400 F.2d 649, 654 (5th Cir. 1968), cert. denied, 394 U.S. 976 (1969).[21] It is not consonant with any purpose reasonably attributable to Congress to provide an incentive for such litigation or to encourage false claims by malingerers, while denying adequate compensation to those (such as respondent) who unquestionably have suffered a serious loss of wage-earning capacity but are nonetheless making the effort to continue working.

Finally, even in cases in which the claim is determined solely by reference to the schedule, litigation is not necessarily avoided. In cases like the present one, involving partial loss of use of a member, the finder of fact is required by Section 8(c)(19) to determine the proportion of loss of use, so that the schedule award may be adjusted accordingly. Here, for example, if the case is remanded for a calculation of the award according to the schedule, it will be necessary to resolve the dispute between the expert witnesses concerning the extent of impairment to respondent's leg (see App. 7a, 46a-47a). By contrast, the

[21] Resolution of total disability claims involves such factors as the "claimant's age, education, industrial history, and the availability of employment a claimant can perform considering his physical condition." *Dugger* v. *Jacksonville Shipyards*, 8 B.R.B.S. 552, 555 (1978), aff'd, 587 F.2d 197 (5th Cir. 1979). See also *American Mutual Insurance Co. of Boston* v. *Jones*, 426 F.2d 1263 (D.C. Cir. 1970).

test under Section 8(c)(21) and Section 8(h) for loss of wage-earning capacity in cases such as this merely involves a calculation of pre- and post-injury earnings and is relatively easy to apply.

In sum, in sustaining respondent's award of compensation for permanent partial disability under Section 8(c)(21) of the Act, the court of appeals adopted a reading of the statutory language that most fully effectuates the congressional purpose, that represents the view of those charged with administering the statute, and that avoids "incongruous or harsh results" (*Baltimore & Philadelphia Steamboat Co.* v. *Norton*, 284 U.S. 408, 414 (1932)). Because "workmen's compensation laws are to be liberally construed in furtherance of the purpose for which they were enacted" (*Industrial Commission* v. *McCartin*, 330 U.S. 622, 628 (1947)), the court below correctly construed the Act to allow respondent to obtain an award that accurately compensates him for the economic loss resulting from his job-related injury.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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